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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

No._____

AUBREY DENNIS ADAMS, Petitioner,

v.

LOUIS L. WAINWRIGHT
and **JIM SMITH**, Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER MR. ADAMS' CONVICTION AND SENTENCE OF DEATH MAY REST UPON A NONEXISTENT CRIME AND/OR A CRIME FOUND TO BE UNCONSTITUTIONAL, IN VIOLATION OF THE FOURTEENTH AMENDMENT, AND WHETHER THE DECISION OF THE CIRCUIT COURT THUS CONFLICTS WITH STROMBERG v. CALIFORNIA, 283 U.S. 359 (1931).

II. WHETHER THERE WAS A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE JURY WAS INFORMED THAT MR. ADAMS' COMMISSION OF CERTAIN NAMED FELONIES COULD SUPPORT A FELONY-MURDER CONVICTION AND COULD BE THE PREDICATE FOR A FINDING OF STATUTORY AGGRAVATING CIRCUMSTANCES, BUT THE JURY WAS NOT INSTRUCTED ON THE ELEMENTS OF THE NAMED FELONIES. WHETHER THE CIRCUIT COURT'S RESOLUTION OF THESE ISSUES CONFLICTS WITH THIS COURT'S DECISION IN HENDERSON V. KIBBE, 431 U.S. 145 (1977), AND THIS COURT'S REQUIREMENT OF RELIABILITY IN CAPITAL PROCEEDINGS.

III. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE APPLICATION OF THE AGGRAVATING CIRCUMSTANCE 'ARREST AVOIDANCE' BECAUSE ITS APPLICATION HERE REFLECTS SUCH A BROAD AND VAGUE CONSTRUCTION THAT IT VIOLATES THE EIGHTH AMENDMENT AND THE COURT OF APPEAL'S DECISION IS IN CONFLICT WITH GODFREY V. GEORGIA

IV. WHETHER THIS COURT SHOULD CORRECT THE CONFUSION AND CONFLICTS IN STATE AND FEDERAL DECISIONS AND EXPLAIN THAT THE EIGHTH AMENDMENT REQUIRES CAPITAL SENTENCING JURY INSTRUCTIONS WHICH CLEARLY AND EXPLICITLY INFORM JURORS OF THEIR OPTION TO RECOMMEND A SENTENCE OF LIFE IMPRISONMENT AND WHETHER THIS COURT SHOULD CORRECT THE ELEVENTH CIRCUIT'S INCORRECT DETERMINATION IN THIS CASE THAT THE JURY WAS ADEQUATELY INFORMED OF THE MERCY OPTION.

V. WHETHER PETITIONER WAS IMPROPERLY DENIED AN EVIDENTIARY HEARING ON HIS CLAIM THAT HE WAS INCOMPETENT TO STAND TRIAL AND BE SENTENCED TO DEATH, AND ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AND WHETHER THE CIRCUIT COURT OPINION CONFLICTS WITH TOWNSEND V. SAIN, 372 U.S. 293 (1963).

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INTRODUCTION

This case involves the review of Aubrey Dennis Adams' first and only petition for writ of habeas corpus. Petitioner's conviction and sentence of death have thus far been upheld even though Petitioner has never received an evidentiary hearing on his factual habeas claims. Furthermore, the capital sentencing process involved critical balancing -- three statutory mitigating circumstances were found, and three statutory aggravating circumstances were held to outweigh them -- and certain of the legal errors asserted here infected this balancing process.

Petitioner, Aubrey Dennis Adams, requests that a writ of certiorari issue to review the decision of the United States Circuit Court for the Eleventh Circuit in Adams v. Wainwright, 764 F.2d 1356 (11th Cir. 1985). Aubrey Dennis Adams is currently under sentence of death in the State of Florida.

OPINIONS BELOW

The opinion of the Circuit Court for the Eleventh Circuit rendered on June 17, 1985, is reported at 764 F.2d 1356. A copy of the opinion can be found in Appendix J to this Petition. A Petition for Rehearing and, In The Alternative, Suggestion for Rehearing En Banc was denied by the Circuit Court on August 13, 1985. A copy of that Order appears as Appendix K. All other prior opinions in this case are also contained in the accompanying Appendices.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the fifth, sixth, eighth, and fourteenth amendments to the Constitution of the United States.

2. This case also involves the Florida Death Penalty Statute, Section 921.141, Florida Statutes, which appears in Appendix L to this Petition.

HOW THE ISSUES WERE RAISED BELOW

Each of the constitutional issues presented in this Petition were raised by petition for writ of habeas corpus in the district court and raised on appeal to the United States Circuit Court for the Eleventh Circuit. Each of the issues had been previously presented to the state courts of Florida, which had rejected the constitutional grounds asserted by Petitioner.

STATEMENT OF THE CASE

A. PRIOR PROCEEDINGS.

(1) Conviction and Direct Appeal.

On April 4, 1978, Petitioner was indicted by the Marion County, Florida, Grand Jury for the first degree murder of Trisa Thornley. (Ex. 15 at 9).[1] The trial judge granted a general motion for change of venue and the case was tried before a jury in Lake County, Florida, beginning on October 12, 1978. At the close of the trial, on October 20, 1978, the jury returned a general verdict finding Petitioner guilty of first degree murder. (Ex. 15 at 115), without specifying whether the verdict was predicated on felony or premeditated murder grounds. The penalty phase commenced about one week after the verdict. The same jury returned an advisory verdict on October 27, 1978,

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[1]The various portions of the record will be referred to as follows:

R: Record from the Eleventh Circuit court below.

The various state court papers were filed as Exhibits 1, 1a-27b. Accordingly, the state proceedings will be referenced by the appropriate exhibit number and page number within the exhibit (i.e., Ex. 15 at 1). Key exhibits are as follows:

Ex. 2-9:	Volumes 1-8 of the transcript of Petitioner's state jury trial.
Ex. 10:	Proceedings on sentencing before the state trial court.
Ex. 15:	Record on direct appeal to the Supreme Court of Florida from the conviction and sentence.
Ex. 25:	Supplemental record on appeal to the Supreme Court of Florida from the denial of Petitioner's motion for post-conviction relief.

Appendices containing selected portions of the record accompanies this Petition. There are twelve appendices designated by the letters "A" through "L." Each section is separately paginated. Citations to the appendices will be referenced by the appropriate letter designation and the page number within the section (i.e., B-4).

indicating that a majority of the jury members wished to recommend the imposition of the death penalty. (Ex. 15 at 130). Sentencing was held on January 16, 1979, at which time the trial judge accepted the recommendation of the jury and sentenced Petitioner to death. (C-1) (Ex. 15 at 140-42). The sentence of death was based upon the trial judge's conclusion that the three statutory mitigating circumstances were insufficient to outweigh the aggravating circumstances. (C-6) (Ex. 15 at 145).

Petitioner's conviction was affirmed by the Florida Supreme Court. Four members voted to affirm both the conviction and the sentence of death. Two justices affirmed the conviction but dissented from the sentence of death. Adams v. State, 412 So.2d 850 (Fla. 1982) (D-1). Justice Boyd dissented from the part of the decision affirming the death sentence by specifically stating that the comparison of the aggravating and mitigating circumstances warranted a reduction of the sentence to life. Justice McDonald also dissented from the death sentence.

A petition for writ of certiorari to this Court was denied, with Justices Brennan and Marshall dissenting. Adams v. Florida, 459 U.S. 882 (1982).

On August 21, 1984, the Governor of Florida denied clemency and signed a death warrant requiring Petitioner's execution by electrocution between noon, September 13, 1984, and noon, September 20, 1984. Petitioner's execution was scheduled for Wednesday, September 19, 1984, at 7:00 a.m. (I-2).

(2) Post Conviction Proceedings--Florida Bar Volunteer Counsel.

Although this is Petitioner's first and only petition for writ of habeas corpus the courts below have failed to provide Petitioner an evidentiary hearing on any of his factual claims. Petitioner has never had an evidentiary hearing of any kind on his claim of incompetency to stand trial, his claim of incompetency to participate in the sentencing phase of his trial, or his claims relating to ineffectiveness of counsel. Absent action from this Court, Petitioner will be executed without having had any type of evidentiary hearing on these substantive

post-conviction claims.

The error to accord Petitioner an evidentiary hearing is inextricably linked to the extraordinarily short time in which volunteer counsel had to prepare this case on behalf of Petitioner. As this Court is aware, a crisis exists and has existed in Florida over the representation of death-sentenced inmates in collateral proceedings. At the time of Petitioner's death warrant, there was no right to post-conviction counsel in Florida, and many death-row inmates consequently became unrepresented upon completion of their direct appeal. During 1982-1984, 40% of the inmates scheduled for execution in Florida were unrepresented when their death warrants were signed.

As a result of this crisis in representation, the Florida Bar established the Special Committee on the Representation of Death-Sentenced Inmates in Collateral Proceedings. The function of that Committee was to recruit civil law firms in Florida to volunteer to represent inmates such as Petitioner. The goal in 1984 was also to establish a Resource Center to assist these volunteer civil attorneys, but that Center did not open until February, 1985.

Petitioner was not represented when his warrant was signed and the undersigned law firm was recruited by the Florida Bar to provide representation. The firm has no prior experience in capital cases or post-conviction cases. Needless to say, this is the first federal habeas corpus petition for Mr. Adams and for counsel.

Petitioner was rushed through state and federal court to the Eleventh Circuit Court before receiving a stay; no evidentiary hearing was afforded along the way. The Eleventh Circuit then denied several of Petitioner's claims on the basis that Petitioner, in his rush to obtain a stay in this first post-conviction proceeding, had failed to prove his claims sufficiently as he passed through the lower courts.

As the below chronology vividly illustrates, the conditions under which the Petitioner was forced to present his case per se limited his ability to address the merits of his claims.

DATE	EXPLANATION
Aug 21, 1984 (Tues)	The Governor of Florida denied clemency and signed a death warrant. Petitioner's execution was scheduled for noon, September 19, 1984. (I-2) (Ex. 25 at 16) (Dist. Ct. opinion at 2) (R-215).
Aug 27 (Mon) (day 1)	Undersigned counsel was informed by the Special Committee that Petitioner faced execution without counsel and without any meaningful opportunity to seek review in state and federal courts. After determining no other legal resources were available to Petitioner, the firm volunteered to represent Petitioner despite its lack of experience in such cases.
Sept 5 (Wed) (day 9)	Petitioner filed a motion for post-conviction relief to vacate judgment and sentence in the state trial court in Ocala, Florida. (Ex. 25 at 17-80). Various other post-conviction motions were also filed this date in the state trial court, including: (1) two-page application for stay of execution; (2) seven-page memorandum in support of Defendant's application for stay of execution; (3) three-page motion for an evidentiary hearing and for the production of Defendant at that hearing; (4) four-page motion for order of insolvency; (5) three-page motion for appointment and payment of experts and investigation; and (6) three-page conditional motion for continuance to allow time for discovery in this case. (Ex. 25 at 81-102).
Sept 7 (Fri) (day 11)	The state post-conviction judge entered the courtroom and immediately began reading an order denying relief. (Ex. 25 at 289-303).
Sept 10 (Mon) (day 14)	The denial of the post-conviction motions were immediately appealed to the Florida Supreme Court. The following were filed with that Court: (1) three-page application for stay of execution; (2) 23-page appellant's brief on appeal. (Ex. 11); (3) petition for state writ of habeas corpus (Ex. 18); (4) voluminous appendix to petition for state writ of habeas corpus (Ex. 17); and (5) reply brief to state's voluminous answer brief. (Ex. 13).

Sept 11 (Tues) (day 15)

Oral argument was held before the Supreme Court of Florida.

The same day, the Supreme Court of Florida rendered its opinion denying the relief sought, Adams v. State, 456 So.2d 888 (Fla. 1984) (F-1). Justice McDonald dissented. He believed the death penalty was improper and disproportionate in view of the mitigating circumstances and the highly questionable aggravating factor of allegedly killing to avoid arrest. He also believed the trial court should have held an evidentiary hearing regarding claims relating to ineffectiveness of counsel and incompetency of Petitioner to stand trial.

Sept 14 (Fri) (day 18)

Petitioner filed his federal petition for writ of habeas corpus in the United States District Court, Middle District, Jacksonville, Florida. (R-5-90). In the Petition, Petitioner again requested an evidentiary hearing.

Also filed this date in Jacksonville were various other motions, including: (1) two-page application for stay of execution; and (2) 14-page memorandum of law in support of Petitioner's application for stay of execution.

Sept 16 (Sun) (day 20)

The state filed a lengthy (over 50 pages) motion for summary denial and memorandum of law in support thereof.

Petitioner was telephonically notified that there would be a non-evidentiary hearing held before Judge Moore in Jacksonville (dist. ct. docket sheet at 3) (G-3).

The state filed a response to Petitioner's application for stay of execution. (R-191-201).

Sept 17 (Mon) (day 21)

Petitioner filed a six-page motion to amend the habeas petition which was granted by the court the same day. (R-205-10) (H-1). The amendment alleged further facts and psychiatric reports regarding Petitioner and his incompetence to stand trial or participate in the sentencing phase of trial, and alleged that these matters required an evidentiary hearing.

Less than 48 hours before Petitioner's scheduled execution, a non-evidentiary hearing on the petition was held in Jacksonville before United States District

	Court Judge Moore. (I-1) and (G-3). (dist. ct. docket sheet at 2.)
Sept 18 (Tues) (day 22)	Judge Moore issued a 27-page opinion denying the petition for writ of habeas corpus and also denying the motion for stay. (I-1) (R-214-40).
	Counsel was telephonically notified of the opinion at approximately 3:00 a.m. (G-5) (dist. ct. docket sheet at 5).
	Petitioner filed with the district court the following: (1) a three-page motion to stay execution pending appeal; (2) an application for certificate of probable cause; and (3) an application for certificate to appeal in forma pauperis. (R-242-45, 252-56).
	The state filed a response to (2) above. (R-246-49).
	The same day, the district court granted Petitioner's certificate of probable cause and leave to appeal in forma pauperis (R-250-51), and denied the motion for stay pending appeal. (R-257).
	Petitioner immediately filed: (1) a notice of appeal to the Eleventh Circuit. (R-252-53); and (2) an 11-page emergency motion for stay of execution.
STAY OBTAINED	Motion for stay of execution pending appeal was granted by the Eleventh Circuit in a two-page order.
Sept 19 (Wed) (day 23)	Petitioner's scheduled execution date.
	The State moved to reconsider the stay and this was denied by the Eleventh Circuit the same day.
	This Court denied attempts by the state to have the stay lifted. Wainwright v. Adams, ___U.S.___, 105 S.Ct. 54 (1984). Voluminous motions and responses were filed by both sides.
Sept 20, 1984-Nov. 1985	Extensive motions, briefs, rehearing, rehearing en banc, oral argument, etc. were had in appellate proceedings on the legal issues before the Eleventh Circuit which resulted in the opinion below, Adams v. Wainwright, 764 F.2d 1356 (11th Cir. 1985). The opinion was dated June 17, and a timely

motion for rehearing was denied on August 13, 1985.

Both the district court below and the Eleventh Circuit have denied Petitioner a hearing on his claims on the basis that he had not proven sufficient facts so as to be entitled to an evidentiary hearing. This apparent "catch 22" (Petitioner is not entitled to an evidentiary hearing until he presents evidence; Petitioner cannot present evidence until Petitioner is granted an evidentiary hearing) is discussed in full at Point V below.

B. STATEMENT OF FACTS.

(1) The Guilt Phase of Trial.

The Eleventh Circuit summarized the facts adduced at Petitioner's guilt-innocence trial as stated below. The footnotes are supplied by undersigned counsel.

> In March 1978, the body of an eight year old girl was discovered in a remote wooded area near Ocala, Florida. The Petitioner's conviction for the young girl's murder was based on circumstantial evidence and incriminating statements he made to investigating officers.[2] Physical evidence found near the body was similar to evidence found in the Petitioner's home and automobile. In a written statement, the Petitioner admitted that he had offered the victim a ride home from school, she had accepted, and he had driven in another direction. The Petitioner remembered "being stopped somewhere and she was screaming and I put my hand over her mouth and she quit breathing."[3] Verbally, the Petitioner admitted

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[2]Both the written and oral statements were sketchy, disjointed, and brief.

[3]As to Petitioner's written statement that she was screaming and he put his hand over her mouth and she quit breathing, it is important to note that the written statement then says "not sure." (Ex. 7 at 1099). It must also be emphasized that the Florida Supreme Court specifically found that the victim did not die from this described suffocation. Adams v. State, 412 So.2d 850, 852 (Fla. 1982). In addition, both in its closing argument at trial, and in subsequent appellate briefs, the State has argued that the victim did not stop breathing or die at this point in time. (Ex. 8 at 1310). In its Brief to the Eleventh Circuit, in arguing that the evidence supports a conviction based on premeditated murder, the State made the statement:

> The evidence was sufficient to support a finding that death was caused by strangulation, not by the Defendant placing his hand over the mouth of the victim, so as to keep her from screaming or yelling.

State's Brief at 17 (emphasis added).

> removing the victim's clothes, using rope to tie her hands, and placing plastic bags over her body. When asked if he had any type of sexual relations with the victim, the Petitioner said he thought he had tried but could not do it or could not bring himself to do it. The testimony of the officers indicates that the Petitioner had difficulty remembering the details of the killing when questioned.[4]

Adams, 764 F.2d at 1358.

(2) The Penalty Phase of Trial.

This offense is Mr. Adams' first and only offense. During the penalty phase of trial, the state elected to rely on the evidence presented during the guilt phase as to aggravating circumstances and preserved its right to present rebuttal to any testimony and evidence introduced by Mr. Adams to show mitigating circumstances. (Ex. 8 at 1380-81; 1389).

Mr. Adams' first witness was Dr. Arthur Sullwold, who was accepted as an expert in the field of psychiatry. (Ex. 8 at 1390-93). Dr. Sullwold examined Mr. Adams on April 27, 1978. (Ex. 8 at 1394). He also interviewed Mr. Adams' parents. (Ex. 8 at 1395). Based upon these contacts, Dr. Sullwold was of the opinion and clinical conclusion that on January 23, 1978, Mr. Adams was in a state of severe emotional stress. (Ex. 8 at 1396). It was Dr. Sullwold's belief that the primary cause of Mr. Adams' emotional stress was a deteriorating marital situation which, among other things, involved his wife seeing a male friend of his who lived in an apartment directly across from the apartment in which he was living. (Ex. 8 at 1396-97).

Dennis Adams' parents, Marjorie and Aubrey Dennis Adams, Sr., testified that they had a loving relationship with Dennis during his childhood. Dennis was a good boy who caused no

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[4]This was all of the evidence used by the State and the courts below to support the conviction and the three aggravating circumstances found by the trial court. As noted in Argument I, infra, the jury was instructed on premeditated and felony-murder theories. The little evidence there was on premeditation, and the aggravating factors was obviously speculative and circumstantial. Under Jackson v. Virginia, 443 U.S. 307 (1979), this evidence is woefully insufficient to support a premeditation finding.

problems during the time he lived with them. He was close to his father, and the family often spent their leisure time hunting and fishing together.

Dennis was a large child, but emotionally immature. Dennis' emotional development never fit his physical development. (Ex. 9 at 1412). This condition continued through his entire adolescence and young adulthood. (Ex. 9 at 1412). Because he was much larger than the other children his age, he was frequently ridiculed and made fun of. (Ex. 9 at 1426). As a teenager, Dennis attended church and youth services and was a member of church youth groups. (Ex. 9 at 1425). He made friends easily, but had no real "best friends." His relationship with his family was better than that with other children. (Ex. 9 at 1426-1427).

At the age of puberty, Mr. Adams' parents convinced a physician to administer hormones to Mr. Adams in order to increase the size of his genitals. (Ex. 9 at 1418). His mother felt that these shots made him change from a person you could hug and touch to a person who did not like to be touched too much, or for anyone to get real close to him. (Ex. 9 at 1419).

Up through the sixth grade, Dennis had quite a few learning problems, but he managed to stay up with his class through his parents' help and summer school. (Ex. 9 at 1417-1418). He graduated from Lake Weir High School in June of 1976. He graduated number 30 out of a class of 213, in the top 15%. His grade point average was 3.26 and he was considered an above-average student. He was well liked by the class, although he was a quiet individual. (Ex. 15 at 136). After graduation, he attended Central Florida Community College and completed 15 hours with a grade point average of 2.67. (Ex. 15 at 136).

Dennis worked part-time during high school and full-time during the summers. (Ex. 15 at 133). During Dennis' last two years of high school, his father became disabled due to a heart condition and Dennis did everything that he could to assist the family. (Ex. 15 at 137).

While employed at Marion Correctional Institution as a Correctional Officer, Dennis was interested in his work in dealing with inmates. (Ex. 15 at 136). He held a service rating of "satisfactory" and his rating indicated that he was well-groomed, reliable and dependable. (Ex. 15 at 136). He completed a standard correctional course at Marion, as well as an 80-hour in-service training program. Dennis received a letter of commendation for his riot squad training. (Ex. 15 at 136). Dennis' co-workers described him as a very good Correctional Officer, a fine gentlemen, and as a happy-go-lucky person with a passive, quiet, and inoffensive personality. (Ex. 9 at 1430, 1433-1434, 1448).

Until the time of this crime, Dennis had never been involved in any criminal activity. (Ex. 9 at 1422, 1427; Ex. 15 at 132).

As a young adult, Dennis was devoted to his family and was very considerate. He was introverted and did not like to socialize. (Ex. 15 at 136). However, on an individual basis, he was a quiet, sympathetic person who was easy to talk to. (Ex. 15 at 137).

During the time he was growing up, Dennis did not have any girl friends. (Ex. 9 at 1427). Until he met his wife-to-be, he had never had any romantic engagements with anyone. (Ex. 9 at 1418). Dennis loved his wife very much; she was his whole life. (Ex. 9 at 1415; Ex. 15 at 137). He has been described as "idolizing" his wife. (Ex. 15 at 133). He kept a couple of hundred pictures of her. (Ex. 9 at 1415). Unfortunately, marital problems began early. When Dennis and Michelle first married, they lived with Dennis' parents. When Dennis would work late, Michelle would have other men pick her up at Dennis' parents' house. (Ex. 15 at 137). Because Dennis' parents did not approve of Michelle's philandering, Dennis and Michelle moved out and found a place of their own. (Ex. 15 at 137).

Dennis and Michelle separated on December 20, 1977, not long before Dennis' 20th birthday. (Ex. 15 at 132). Dennis was very upset on Sunday, January 22, 1978, the day before

Trisa Thornley's death. His wife had been seeing one of his co-workers, who lived across the street, and he knew that she had spent the night with his friend Saturday night, and that she was still there. (Ex. 9 at 1413-14). That night, he told his mother that he would give his whole life to have his wife back. (Ex. 9 at 1415). On the night of January 22, he kept going to his window to see if his wife's car was still across the street at his friend's house. (Ex. 9 at 1416-21). On January 23, his wife's car was still across the street and he remained very upset. (Ex. 9 at 1417, 1422). On Monday, he decided to go ahead and get a divorce and told his mother that he would be getting her divorce papers that day. (Ex. 9 at 1416). The date of the victim's disappearance was on or about January 23, 1978.

Dennis' characteristic way of handling strong emotions, such as feelings about his wife's open infidelity, was to withdraw into himself. (Ex. 8 at 1397). He was diagnosed by a psychiatrist as being in a state of "severe emotional stress" at the time the crime was committed. (Ex. 8 at 1398).

After hearing evidence in the penalty phase of the trial, the jury recommended by majority vote that Mr. Adams be sentenced to death. (Ex. 10 at 14-15). On January 16, 1979, the trial court sentenced Mr. Adams to death. (C-1-8).

The trial judge found three mitigating circumstances: (1) that the defendant had no significant history of prior criminal activity; (2) that the capital felony was committed while the defendant was under the influence of extreme emotional disturbance; and (3) the defendant's age (20 at the time of the crime). (Ex. 25 at 10). Despite these factors, Mr. Adams was sentenced to death.

In support of its sentence, the trial court found three aggravating circumstances. The first was that the capital felony was committed while defendant was engaged in or attempting to engage in, or in the flight after committing or attempting to commit rape and/or kidnapping. (Ex. 25 at 8). The finding of rape or attempted rape was based solely on the fact that the

victim's clothes were removed and that Mr. Adams made a statement that he thought he tried to have sexual relations with the victim but couldn't bring himself to do it. (Ex. 25 at 12). The second was that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest. This finding was based solely on the trial court's previous finding regarding kidnapping and rape and that the victim's death prevented any testimony on her part concerning kidnapping and rape. (Ex. 25 at 12). The third was that the capital felony was especially heinous, atrocious, or cruel. (Ex. 25 at 8-9).

Additional facts and/or events occurring in the course of the proceedings will be referred within the separate arguments.

REASONS FOR GRANTING THE WRIT

This capital case involves several important issues which should be decided by this Court. The decision of the United States Circuit Court for the Eleventh Circuit is inconsistent with the decisions of this Court and conflicts with decisions of other federal courts of appeal and state courts of last resort. It presents constitutional issues of fundamental importance which are set forth within the five arguments presented infra.

ARGUMENT

I. MR. ADAMS' CONVICTION AND SENTENCE OF DEATH MAY REST UPON A NONEXISTENT CRIME AND/OR A CRIME FOUND TO BE UNCONSTITUTIONAL, IN VIOLATION OF THE FOURTEENTH AMENDMENT, AND THE DECISION OF THE CIRCUIT COURT CONFLICTS WITH STROMBERG v. CALIFORNIA, 283 U.S. 359 (1931).

In this case, the jury was instructed that they could convict Mr. Adams of first degree murder, without finding premeditation, if they found that the killing took place while he was committing an "abominable and detestable crime against nature." However, at the time the killing took place, there was no such crime in Florida. A conviction based on such a non-existent or unconstitutional crime violates due process.

This identical claim was presented to the Court in Dobbert v. Wainwright, ___U.S.___, 105 S.Ct. 34 (1984), but in Dobbert the issue was not decided on the merits because it was first raised in a successor habeas petition. The Dobbert federal district court had rejected this claim on abuse of the writ grounds, without addressing the merits. The Dobbert Eleventh Circuit Court simply adopted the district court decision, with a dissenter believing this Stromberg issue should be addressed on the merits.

This Court declined to grant certiorari on the issue of abuse of the writ.[5] Even in that "abuse" setting, two members of the Court believed the claim presented in Dobbert, and now herein, to be sufficiently compelling to merit review:

> The instruction at issue told the jury that it could convict for first degree murder if it found that the daughter was killed by premeditated design or that she was killed without premeditation but while Dobbert was committing an "abominable and detestable crime against nature." As a matter of state constitutional law, the Florida Supreme Court, in a holding that preceded the crimes for which Dobbert was convicted, had held that the statutory term "crime against nature" is too vague to sustain a conviction. Franklin v. State, 257 So.2d 21 (Fla. 1971). Dobbert was therefore found guilty after a felony-murder instruction that permitted the jury to

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[5]Mr. Adams presents this "error of federal constitutional magnitude" free of the abuse constraints that bound this Court and Mr. Dobbert.

> convict him of a crime that did not exist under state law at the time of his conviction.
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> . . . .
>
> This is clearly error of federal constitutional magnitude. In Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), the Court announced a rule from which we have not since departed: "a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground." Zant v. Stephens, ___U.S.___, ___, 103 S.Ct. 2733, 2745, 77 L.Ed.2d 235 (1983). It is also clear that Stromberg applies to state criminal proceedings, for Stromberg itself involved a state conviction. See also Williams v. North Carolina, 317 U.S. 287, 292, 63 S.Ct. 207, 210, 87 L.Ed. 279 (1942); cf. Zant, ___U.S.___, 103 S.Ct. at 2748-50 (Justice WHITE, concurring in part and concurring in the judgment) (Stromberg applies when jury was invited to convict on two or more grounds, one of which was not sufficient to sustain the conviction).

Dobbert, 105 S.Ct. at 43 (Marshall, Brennan, JJ., dissenting from denial of certiorari).

The jury instruction at issue in this case was particularly prejudicial because of the nature of the trial and the State's arguments. Mr. Adams was arrested by warrant charging that he unlawfully killed a human being "while in the attempt to perpetrate sexual battery." (Ex. 15 at 1). He was indicted for first-degree murder, charging him, in the usual form in Florida, with killing "from a premeditated design to effect the death of" the victim, "in violation of Florida Statute 782.04."[6] (Id. at 9). The victim was an eight-year-old girl. Upon his arrest, Mr. Adams told police that the victim died when he put his hand over her mouth and she quit breathing. (Ex. 7 at 1099). The victim was unclothed when found, and police investigators testified that they asked Mr. Adams whether he had had sexual relations with the victim, to which he responded "he

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[6]Section 782.04, Fla. Stat., is also the felony-murder statute in Florida. See Appendix L-1. The indictment charged premeditated and felony-murder, see n. 11, infra, as a matter of black letter Florida state law.

just couldn't bring himself to do it ...." (Id. at 1128-29).[7]

The trial transcript reflects that an allegation of "sex offense" nevertheless permeated the proceedings. The State was explicit in its allegations from the beginning of trial. In opening statement, the prosecution underlined for the jury its theory of the circumstance of the crime:

> I think he took her to his house...to have intercourse with her but she was too small.

(Ex. 4 at 443).[8] The trial record is replete with references to sexual abuse and the removal of the victim's clothes (See Exs. 2-9, especially pages 443, 1100, 1132, 1128-31, 1135, 1163, 1170, 1310-12, 1330-32), which the prosecution finally elevated to the category of "sex lust" during closing argument. (Id. at 1312).

Injected into this aura of "sex lust" was a jury instruction inviting the jury to convict Mr. Adams of first-degree murder if they found the actions of Mr. Adams to constitute an "abominable and detestable crime against nature" or "rape." Id. at 1351. These "offenses" did not exist in Florida at the time of the jury instruction, and understandably went undefined.

Mr. Adams' contention, heretofore a matter of black-letter law, is that when a general verdict may be based on a

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[7]Police took a written statement from Petitioner which was introduced at trial. (Ex. 8 at 1098). The written statement contains no mention of attempted sex. Police "remembered," a month or so after the written statement was taken, that Petitioner had also discussed the matter of sex. (Ex. 8 at 1132). According to the officers, Petitioner was asked whether he had sex with the victim. The officers described Petitioner's response as: "he thought he had tried to but he didn't think he did"; "he just couldn't bring himself to do it"; he "couldn't do it;" and he "didn't do it." (Ex. 7 at 1100, 1128-31, 1170). Petitioner indicated to the officers that he removed the victim's clothes after she quit breathing. (Ex. 7 at 1135).

[8]There was no evidence to support this bold and calculatedly prejudicial preposition. See n. 4, supra. This "too small" characterization of why Mr. Adams allegedly abandoned a sexual offense is nothing short of manufactured. In fact, there was insufficient evidence to convince any rational juror of Petitioner's guilt of any sex related offense beyond a reasonable doubt, Jackson v. Virginia, 443 U.S. 307 (1979), even if the jury had been correctly instructed with regard to a constitutionally adequate statutory violation. See Petitioner's brief on direct appeal, Ex. 11 at 37-38; federal petition for writ of habeas corpus, at 22, n, 9 (R-26); the initial Eleventh Circuit Brief for Petitioner appellant (Habeas Corpus), Eleventh Circuit Petition for Rehearing and Suggestion for Rehearing En Banc at 5-6.

constitutionally adequate ground (premeditation)[9] or on a constitutionally impermissible ground (the non-existent felony-murder ground, murder during the course of an abominable and detestable crime against nature, or rape), the verdict cannot stand. Stromberg v. California, 283 U.S. 359 (1931). The circuit court decision rejecting this fundamental proposition is in error, and in conflict with long-standing and recently reaffirmed constitutional law. Zant v. Stephens, 462 U.S. 862 (1983); Chiarella v. United States, 445 U.S. 222, 237 n. 21 (1980); Leary v. United States, 395 U.S. 6, 31-32 (1969); United States v. Gallagher, 576 F.2d 1028, 1046 (3d Cir. 1978). Certiorari is appropriate under these circumstances. U.S. Sup.Ct. R. 17.1(c). If Stromberg is to be applied in the manner contemplated by the Circuit Court, this Court should be the instigator. Id.

Mr. Adams' second contention, separate and apart from the verdict issue, is that the sentence of death violates the eighth amendment when, as here, there can be no finding that Petitioner intended the death of the victim. Enmund v. Florida, 458 U.S. 782 (1982); Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985). The Circuit Court neglected to address this second contention, but Eleventh Circuit law is in conflict with Fifth Circuit law on this issue, which is now pending before the

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[9]Petitioner's use of the term "constitutionally adequate" should not mislead. There was insufficient evidence even of premeditation, but had there been sufficient evidence, premeditation would be a permissible verdict basis. See n. 4, supra. See also Eleventh Circuit Brief for Petitioner-Appellant (Habeas Corpus), at 59: "Here, there may have been no premeditation, deliberation, intent, or cold calculus that precedes the decision to act."

Court.[10]

A. The Petitioner was Indicted for Premeditated and Felony-Murder, and the Jury was Invited to Convict Petitioner of First Degree Felony-murder Predicated Upon Nonexistent Felonies.

In Florida, the "usual form" of indictment for first degree murder under Section 782.04, Florida Statutes (1977) (set out in Appendix L), is to "charg[e] murder ... committed with a premeditated design to effect the death of the victim." Barton v. State, 193 So.2d 618, 624 (Fla. 2d DCA 1968).[11] The absence of felony-murder language is of no moment: when a defendant is charged in Florida with a killing through premeditated design, he or she is also charged with felony-murder, and the jury is free to return a verdict of first degree murder on either theory. Hill v. State, 133 So.2d 68 (Fla. 1961); Larry v. State, 104 So.2d 352 (Fla. 1958); Blake v. State, 156 So.2d 511 (Fla. 1963). Citing Barton, the Florida Supreme Court affirmed this proposition in Petitioner's direct appeal. Adams, 412 So.2d at 852 ("[u]nder this charge, the state could prosecute under both a theory of premeditation and a theory of

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[10] If Petitioner is correct on the Stromberg claim, the Enmund issue is moot. If Petitioner is incorrect on the Stromberg claim, Enmund may or may not arise. The Enmund claim is not simply a matter of sematics, but has serious eighth amendment implications. If the jury could have found felony-murder and no intent, then the death penalty is invalid under fifth circuit law. Jones v. Thigpen, 741 F.2d 805 (5th Cir. 1984) (sentence vacated). This Court is now reviewing the correctness of this Fifth Circuit analysis. Bullock v. Lucas, 743 F.2d 244 (5th Cir. 1984) (sentence vacated), cert. granted, Cabana v. Bullock, ___ U.S. _____, 53 U.S.L.W. 3757 (U.S. April 17, 1985) (No. 84-1236). The sentence is also invalid under Eleventh Circuit law, since the evidence of intent is insufficient. Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985) (en banc). See n. 4, supra. Mr. Adams' second contention depends upon the outcome in Cabana v. Bullock, and its resolution should await this Court's decision there.

[11] See also Buford v. Wainwright, 428 So.2d 1389, 1391 (Fla. 1983); State v. Pinder, 375 So.2d 836, 839 (Fla. 1979); Knight v. State, 338 So.2d 201, 204 (Fla. 1976), all recognizing the Barton rule. Such an indictment by long-standing Florida practice, charges felony-murder as well as premeditated murder, despite the apparent absence of felony-murder language in the body of the indictment. Larry v. State, 104 So.2d 352 (Fla. 1958); Southworth v. State, 125 So. 345, 346 (Fla. 1929) (An indictment "charging [only] murder to have been committed with a premeditated design to effect the death" of the victim "charge[s] murder in the first degree, when committed in the perpetration of robbery."); Hargrett v. State, 255 So.2d 298, 300 (Fla. 3d DCA 1971).

felony-murder").

Mr. Adams was charged with first degree murder in the "usual form": murder "from a premeditated design to effect the death of" the victim, "in violation of Florida Statute 782.04." (Ex. 15 at 9). As already discussed, an indictment such as this which "tracked the statute" charges felony-murder: Section 782.04 is the felony-murder statute in Florida. See Appendix L; See also Lightbourne v. State, 438 So.2d 380, 384 (Fla. 1983). As the Circuit Court noted, the jury charge at guilt-innocence listed:

> as "murder in the first degree," both premeditated murder and felony-murder, with the latter being defined as killing during the commission of, or an attempt to commit, "rape,...abominable and detestable crime against nature or kidnapping...."

Adams, 764 F.2d at 1361 (footnote omitted).[12] The decision noted that rape "did not exist under Florida law," Id., at n. 3, and that "[t]he Florida statute prohibiting abominable and detestable crimes against nature had been declared unconstitutional before the Petitioner's trial. Franklin v. State, 257 So.2d 21 (Fla. 1971)."[13] Id. at 1361. The Circuit Court opined finally that:

> [t]he jury returned a general verdict finding the Petitioner guilty of murder in the first degree, without specifying whether the crime was premeditated or whether it simply occurred while the Petitioner was committing or attempting to commit one of the enumerated felonies.

Id. These findings place this case "on all fours" with Stromberg. Mr. Adams contends the Circuit Court incorrectly applied Stromberg and wrote with a basic misunderstanding of

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[12]Upon reviewing this instruction, the Florida Supreme Court recognized that a "felony murder instruction was given." Adams, 412 So.2d at 853. This is an interpretation of state law by a state's highest court, and it should be binding on federal courts. The panel below ignored the Florida Supreme Court's own interpretation of the state jury instruction.

[13]In Christian v. State, 272 So.2d 852, 856-57 (Fla. 4th DCA 1973), a case involving the same unconstitutional felony murder charge (abominable and detestable crime against nature), the court held that "[t]he act of instructing the jury that it could find the defendant guilty of a non-existent crime pursuant to an unconstitutional statute is fundamental error of the worst sort." The panel below held otherwise.

Florida law regarding a charge and a conviction of first degree felony-murder.

B. Stromberg v. California Voids the Conviction.

At the trial of this case, the state trial court instructed the jury on first degree murder as follows:

> The killing of a human being in committing, or in attempting to commit any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping is murder in the first degree even though there is no premeditated design or intent to kill.

(A-7) (emphasis added). This charge was repeated or referred to no less than four times during the jury instructions (A-7, 8, 11-12). The Florida Supreme Court held that this was a "felony-murder instruction." Adams, 412 So.2d at 850. Thus, under Florida law, the jury was clearly charged that, even without premeditation, the commission of a murder during the course of rape or an abominable and detestable crime against nature is murder in the first degree. There is no dispute between the parties regarding the following: (1) the jury was told that the killing of a human while committing or attempting to commit an abominable and detestable crime against nature, or rape, is first degree murder; (2) the jury returned a general verdict finding Petitioner guilty of first degree murder; (3) there is no such crime in Florida as an abominable and detestable crime against nature and there was no crime of rape, Adams, 412 So.2d at 852-53; and (4) the former crime of an abominable and detestable crime against nature was found to be unconstitutional and void for vagueness in Franklin v. State, 257 So.2d 21 (Fla. 1971). The resulting conviction is a clear violation of Mr. Adams' rights to due process.[14]

This Court in Stromberg v. California, 283 U.S. 359 (1931), held as a matter of due process that a verdict which might be based on an unconstitutional ground cannot stand, even if there

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[14]Petitioner's conviction cannot be allowed to stand because it is a fundamental requirement of due process that a person not be convicted of a crime that does not exist. Adams v. Murphy, 653 F.2d 224, 225 (5th Cir. 1981).

are alternative theories to support the verdict.[15] The Stromberg rule is that when the jury is instructed on alternative theories, "it is impossible to say under which clause of the statute the conviction is obtained." Id. at 368 (emphasis added). Thus Stromberg teaches that the reviewing courts are not to look at whether there is sufficient evidence to support a jury verdict on a legal ground where one of the grounds charged is unconstitutional.[16]

There is no equivocation in the Stromberg holding. Under Stromberg, the appropriate analysis is not whether there was sufficient evidence of premeditation, but whether under the jury instructions the jury was permitted to convict for an unconstitutional and/or nonexistent charge. The jury here was instructed that murder during rape or during an abominable and detestable crime against nature was first degree murder, and the trial jury reached a general verdict, stating only that Petitioner was guilty of first degree murder. The verdict does not specify whether the jury's decision was based on the nonexistent and unconstitutional crimes. Therefore, under Stromberg and its progeny, the conviction and sentence cannot stand since "it

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[15]The principle of Stromberg has been consistently reaffirmed by this Court. Leary v. United States, 395 U.S. 6 (1969); Thomas v. Collins, 323 U.S. 516, 528-29 (1945); Terminiello v. Chicago, 337 U.S. 1, 5 (1949); Yates v. United States, 354 U.S. 298, 311-13 (1957); Street v. New York, 394 U.S. 576, 585-88 (1969); Bachellar v. Maryland, 397 U.S. 564, 570-71 (1970). See also Zant v. Stephens, 462 U.S. 862 (1983). In Zant, the court described the Stromberg rule:

> One rule derived from the Stromberg case is that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground.

462 U.S. at 881 (emphasis added).

[16]Since Stromberg, no federal court has weighed the evidence in a record for the purpose of making an independent determination as to whether the jury in such a case could have based its verdict on valid grounds. Of the cases previously cited by the State, the only case which makes an extensive review of the evidence is Cramer v. United States, 325 U.S. 1 (1945). The Court in that case, however, made it clear that the purpose of its review was to determine if the evidence supported all of the grounds on which the Defendant was convicted. Id. at 36. Since there is no amount of evidence which could ever support a conviction based on a nonexistent crime, such an approach is not warranted in this case.

is impossible to say under which clause of the statute the conviction was obtained." Stromberg, 283 U.S. at 368.[17]

C. It is Impossible to Discern the Basis for the Jury's Verdict.

The Circuit Court acknowledged that the jury was instructed that felony-murder was first degree murder and that murder during the commission of rape or an abominable and detestable crime against nature was felony-murder. The decision also acknowledged that a general verdict of guilt was returned. The Circuit Court also agreed that the crimes of rape and abominable and detestable crime against nature did not exist, thereby agreeing sub silentio that a first degree felony-murder conviction based on these felonies would violate due process. The court then broke new ground by deciding that Stromberg did not require a reversal.

The flaw in the lower court's decision is its interpretation of Stromberg: the Circuit Court explained that Stromberg states simply that if it is "impossible" to say on which ground the verdict rests, the conviction must be reversed, Stromberg, 283 U.S. at 368. Adams, 764 F.2d at 1362. The court then "explained" why it was not impossible here. Stromberg, in fact, does not ask a reviewing court to determine whether it is impossible to say on which ground the verdict rests. Stromberg, at the cited page, states unequivocally that, when the jury instruction is on alternative grounds and a general verdict is returned, it is impossible to determine which ground the jury used. There is no room for speculation per Stromberg under these circumstances: it is impossible to say upon which ground the verdict rested.

Even under the Circuit Court's misreading of Stromberg, the verdict must be reversed. The Circuit Court gave the

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[17]The State has argued that the Stromberg rule applies only when one of the two theories under which the case was submitted to the jury involves constitutionally protected behavior. This Court has never before so limited Stromberg, see Leary v. United States, 395 U.S. 6, 31-32 (1969); Chiarella v. United States, 445 U.S. 222, 237 n. 21 (1980); Zant v. Stephens, 462 U.S. 862 (1983).

following reasons why it was possible to discern that the verdict was based upon premeditation.

(1) "The indictment charged the Petitioner with premeditated murder. Felony-murder was not alleged." Adams, 764 F.2d at 1361.

This is a misunderstanding of Florida law, and in direct conflict with the Florida Supreme Court's decision in this case.[18] The indictment indeed did say the murder was from a premeditated design, and that the murder was in violation of Section 782.04, Florida Statutes. Under Florida law, this is a "charge" and "allegation" of felony-murder. See discussion and cases at text, pp. 18-20, supra. The jury was specifically instructed that this indictment included a charge of felony-murder and the Florida Supreme Court explicitly recognized that the jury was instructed on felony-murder. Adams, 412 So.2d at 850. It was then fundamentally flawed reasoning for the court to conclude that "the indictment charging only premeditated murder was submitted to the jurors ...." Adams, 764 F.2d at 1363. The indictment did charge felony-murder, under Florida law, the jury was told so, the Florida Supreme Court acknowledged both these state law propositions, and the indictment cannct thus serve as a basis for saying it is possible to discern upon which ground the jury verdict was based.

(2) The trial court's reference to felony-murder "appears early in the instructions as part of what were, in essence, statutory definition. The actual and controlling charge came later ...." Adams, 764 F.2d at 1362-63.

In the quoted sentence, the Circuit Court appears to suggest that when instructions are "early" and merely "statutory definition," it is possible to say that the jury ignored them. The fact that the jury was given statutory definitions is the heart of Mr. Adams' complaint: the indictment read and

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[18]The circuit court correctly noted that the Florida Supreme Court had misanalyzed the Stromberg issue, but the Florida supreme Court did not misanalyze Florida law in its conclusion that felony-murder was charged or instructed. The panel improperly substituted its interpretation of Florida law for the Florida Supreme Court's interpretation.

submitted to the jury[19] recited that the killing was "in violation of Florida Statute 782.04," and, as the Circuit Court concluded, the jury was then instructed on the "statutory definitions": felony-murder. The Florida Supreme Court recognized that there was an "actual" jury charge on felony-murder. Adams, 412 So.2d at 852.

That these instructions came "early" hardly eliminates their effect. The felony-murder instruction fell on the heels of the court's instruction that "your verdict must be based solely on ... the law as it is given to you by the Court," A-2, and was never contradicted by any other instructions of the court. The Circuit Court decided, however, in a three-sentence analysis, that the only important law "as it is given to [the jury] by the Court" came later:

> The actual and controlling charge came later in the instructions, when the trial court told the jurors that, if the elements of homicide were found, their next task would be to determine its degree. At this point, premeditated murder was the only killing stated to constitute murder in the first degree. Therefore, the jurors were actually instructed to consider only premeditated murder as murder in the first degree.

Adams, 764 F.2d at 1362-63 (footnotes omitted). The court gave no more indication of why the "later" instruction was "controlling," why it, as opposed to the earlier felony-murder instruction, was the "actual...charge," or why the court ignored the Florida Supreme Court's recognition and explanation of Florida felony-murder law.

In fact, unlike the specific felony-murder instruction, the "later" instruction referred to by the court was given simply "[t]o summarize." Adams, 764 F.2d at 1363, n.6. A summary by definition does not include all that has come before. For instance, before its summary, the trial court had instructed the jury for over a page of transcript regarding premeditation. (A-5-6). It was not repeated in the Circuit

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[19]The jury actually carried the indictment with them to the jury room during deliberations. (Ex. 8 at 1368).

Court's relied upon summary of all instructions, which lasted a little over a page. Adams, 764 F.2d at 1363, n. 6. The jury had been instructed for two pages on what "unlawful homicide" meant before the summary, A-3-4, and the summary reduced the discussion to a paragraph. Second-degree murder was similarly "summarized."

The felony-murder instruction was simple, clear, had been stated twice, and required no summary:

> The killing of a human being in committing or in attempting to commit any ... rape ... abominable and detestable crime against nature ... is murder in the first degree, even though there is no premeditated design or intent to kill. If a person kills another while he is trying to do or commit any ... rape ... abominable and detestable crime against nature ... or while escaping from the immediate scene of such crime, the killing is in the perpetration of or in the attempt to perpetrate such ... rape ... abominable and detestable crime against nature ... and is murder in the first degree. The punishment provided by law for murder in the first degree is life imprisonment or death. ...

(A-7). After the later "summary" the trial court again instructed, without any mention of premeditation, "if you find the defendant guilty of murder in the first degree, then at a later proceeding you will render an advisory sentence to the Court recommending that the Defendant be sentenced to life or death." (A-11).

There is no basis for believing that a jury understood the "summary" to be the only "actual and controlling charge," or that because of it, it is possible to determine the ground upon which the verdict was based.

(3) "(1) a felony-murder theory was not advanced at trial, (2) the closing arguments of both the State and the Petitioner focused on premeditation to the complete exclusion of felony-murder." Adams, 764 F.2d at 1363.

These two factors are the remaining factors which convinced the Circuit Court that "it is not impossible to determine on which ground the Petitioner's conviction for first degree murder rests." Adams, 764 F.2d at 1363. These "factors" are not correct, and even if correct, do not make it possible to discern the basis for the jury's verdict.

First, it is not accurate to say across the board that felony-murder was not suggested to the jury during trial and argument. As discussed in detail in text, pages 15-16, supra, the aura of "sex-offense" permeated the trial and the State's prosecution. The prosecution began the trial by accusing the defendant of what most reasonable jurors would consider an abominable and detestable attempted rape or crime against nature: attempted forced sexual intercourse with an eight-year old girl ("I think he took her to his house...to have intercourse with her but she was too small.") (Ex. 4 at 443).[20] In closing arguments, the State accused Mr. Adams of "sex lust," Ex.8 at 1312, and throughout the trial there were references to the victim's nudity and questions regarding whether she was disrobed before her death. See text, page 16, supra. It simply blinks reality to believe that the jury was not encouraged to believe that Mr. Adams was guilty of an abominable and detestable sex offense.

Even if it is accepted that the actual argument was restricted to premeditated murder,[21] that merely accentuates the harmfulness of the felony-murder instruction. Without doubt, premeditation was hotly disputed, and deserved considerable argument because of the dirth of the evidence on the issue.[22] The jury instruction, however, made the jury's task simple on the complex premeditation issue: they could simply ignore it, and still find Petitioner guilty of first degree murder, by finding sex offense.

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[20]As previously discussed, there was no evidence to support this theory. See n. 8, supra.

[21]Of course, argument is not evidence or law. The jury was instructed that closing argument was "not to be construed by you as evidence in this case or instructions on the law." (Ex. 8 at 1299). During jury selection the State told jurors to apply the law as instructed by the Court:

> Mr. Oldham: Whatever the Court tells you the law is, will you follow that... regardless of what I think the law is or Mr. Black or someone else, would you do that?

(Ex. 2 at 34-35). Assuming the jury agreed with these propositions, theories advanced or arguments made were irrelevant. The court's instruction was the only definition of what was and was not illegal.

[22]See nn. 2-4, supra.

If premeditation was too hard to decipher, as it should have been, based on the evidence, the jury could simply not bother. The prosecution's "sex lust" theory was all the jury had to accept, and it is impossible for any court to say the jury did not.

D. By Affirming the Statutory Aggravating Circumstances of Felony-Murder, the Circuit Court Recognized the Compelling Possibility that the Jury Verdict of Guilt Rested on Felony-Murder Grounds.

The only evidence offered by the State at sentencing was rebuttal evidence having nothing to do with the nature of the crime. The State specifically relied on only what the jury and court had already heard at guilt-innocence to establish statutory aggravating circumstances. The trial judge held that this evidence proved the statutory aggravating circumstance of felony-murder (rape/kidnapping), and the Circuit Court affirmed that finding. Adams, 764 F.2d at 1363-65. It cannot be reconciled now, what was compellingly valid for the judge to find at sentencing was "impossible" for the jury to find at guilt-innocence.

The Circuit Court simply ignores that which even the Florida Supreme Court acknowledged: the jury was instructed upon and could have relied upon felony-murder. In the Florida Supreme Court decision, the court took great pains to analyze the evidence to determine "whether the evidence was sufficient to support a finding of premeditated murder." Id. at 1362. That analysis would be moot had the jury not been entitled to rely on felony-murder. The Florida court believed the jury could but did not rely on felony-murder. The Circuit Court acknowledged that the Florida Supreme Court's weighing of the evidence was improper under Stromberg but then created from whole cloth the notion that the jury could not have relied on felony-murder, for the reasons explained above.

Based on the evidence presented and the instructions given the jury, there is no way to determine whether or not the jury based its decision on a nonexistent and/or unconstitutional crime. As a result, Mr. Adams' conviction cannot be allowed

to stand because it is a fundamental requirement of due process that a person not be convicted of a crime that does not exist. A writ of certiorari to review the decision of the Circuit Court should be granted: the decision is in conflict with Stromberg.

II. THE JURY WAS INFORMED THAT MR. ADAMS' COMMISSION OF CERTAIN NAMED FELONIES COULD SUPPORT A FELONY-MURDER CONVICTION AND COULD BE THE PREDICATE FOR A FINDING OF STATUTORY AGGRAVATING CIRCUMSTANCES, BUT THE JURY WAS NOT INSTRUCTED ON THE ELEMENTS OF THE NAMED FELONIES, IN VIOLATION OF THE EIGHTH AND FOUTEENTH AMENDMENTS, AND THE CIRCUIT COURT'S RESOLUTION OF THESE ISSUES CONFLICTS WITH THIS COURT'S DECISION IN HENDERSON V. KIBBE, 431 U.S. 145 (1977), AND THIS COURT'S REQUIREMENT OF RELIABILITY IN CAPITAL PROCEEDINGS.

It is impossible to determine whether the verdict in this case rested upon premeditated or felony-murder grounds. See Argument I. If the verdict rests on felony-murder grounds, it is fundamentally flawed, for reasons unrelated to Argument I. The trial court did not define for the jury the elements of the underlying felonies upon which their felony- murder conviction could be based. Since the jury could have convicted Mr. Adams of felony-murder without knowing the elements of the underlying felonies and without determining whether the elements were proven beyond a reasonable doubt, a felony-murder conviction here violates due process. Henderson v. Kibbe, 431 U.S. 145 (1977). Stromberg requires reversal of the conviction, but the Stromberg error spills over into and infects this claim.[23]

It is not only the verdict that suffers from this instructional omission. The jury was allowed to consider and find a statutory aggravating circumstance -- killing in the commission of a sexual battery and/or kidnapping -- without knowing the elements of the crimes of sexual battery or kidnapping. Thus,

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[23]The Circuit Court rejected this argument on the merits, "since we have already determined that the jury considered and found only premeditated murder." 764 F.2d at 1364. The Circuit Court's decision on critical and fundamental constitutional issues is thus completely wrapped up in the Stromberg misanalysis, and Mr. Adams' life literally hangs in the balance. No procedural bar to the consideration of this claim was entertained.

the jury recommendation of the death sentence, which the trial judge must accord to great weight under Florida law, Tedder v. State, 322 So.2d 908, 910 (Fla. 1975),[24] was not a reliable recommendation. It was completely unguided and unchanneled in violation of the eighth amendment. The court of appeals failed to analyze the error in terms of eighth amendment law.

A. Guilt-Innocence.

The state must prove the elements of a crime beyond a reasonable doubt to sustain a conviction. Jury instructions which fail to inform the jurors of the burden or of the essential elements which must be proven are constitutionally lacking, and a conviction based upon such faulty instructions violates due process. Henderson v. Kibbe, 431 U.S. 145 (1977).

In Kibbe, this Court addressed the question of whether the failure to define one element of an offense (causation in vehicular homicide) was fundamental due process error requiring reversal. Under the circumstances in Kibbe, this Court held that in collateral proceedings the fourteenth amendment question is whether the instruction so infected the entire trial that the resulting conviction violated due process, 431 U.S. at 154, and no such "infection" occurred in Kibbe.

Kibbe involved an "element" often subsumed in other elements -- causation. This Court recognized that the jury's finding of "recklessness" in Kibbe was in large part a finding of causation, and no prejudice resulted from the omission of a causation instruction.

More "critical elements" of crimes, when omitted from jury instructions, may indeed cause a fourteenth amendment violation. For instance, in Glenn v. Dallman, 686 F.2d 418 (6th Cir. 1982), the habeas petitioner contended that the state's charge of aggravated burglary required, as an essential element

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[24]By contrast, a jury recommendation of life imprisonment in Alabama and Indiana, the only two other states with the jury override, is entitled to no special deference. Ala. Code § 13A-5-473(1981); Ind. Code Ann. § 35-50-2-9(e)(2). Instructional error in these states would therefore be harmless. Baldwin v. Alabama, ___U.S.___, 105 S.Ct. 2727 (1985).

a finding that a person was either present or likely to be present in an occupied structure at the time of the crime. The state trial court had simply charged the jury that there must be unlawful entry of an occupied structure.

There was no question in Glenn, just as there is no question here, that the state law required that essential elements of the crime must be charged to the jury. The federal district court in Glenn, however, found the omission to be "harmless error" because the evidence was sufficient to require a reasonable juror to conclude that the element omitted in the instruction was present. Id. at 420.

On appeal, the Sixth Circuit Court reversed. The court recognized that this Court in Kibbe required a federal habeas petitioner to show that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." However, the court had little difficulty in determining that the trial court's erroneous instruction met this standard:

> It is a fundamental constitutional law that no one may be convicted of a crime absent proof beyond a reasonable doubt of every fact necessary to constitute that crime. See, e.g., In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Where a jury sits as the finder of fact in a criminal trial, the court's instructions to the jury concerning the necessary elements of the crime charged are the only means of assuring that the State is put to its burden of establishing every element of the crime. While the stringent test enunciated by the Supreme Court in Henderson [Kibbe] may insulate many if not most varieties of erroneous jury instructions in state criminal trials from federal habeas corpus relief, the complete failure to instruct on an essential element of a crime must, in most cases, be an exception.

Glenn, 686 F.2d at 420-21 (footnote omitted) (emphasis added).

Glenn and Kibbe demonstrate that there is a continuum of prejudice which may arise from instructional omissions related to the elements of a crime. In Kibbe, the omission of the element of causation was not sufficiently prejudicial -- it is simply common sense that a juror would intuit the necessity for a finding of causation, and it was "clear to the jury that such an issue had to be decided." 431 U.S. at 153-54. The element

omitted in Glenn could not be so intuited -- that is, that a person must have been in the premises for the crime of aggravated burglary to have been committed.

The case sub judice is much further than Kibbe or Glenn along the prejudice continuum. Mr. Adams does not complain about the omission of a common sense element, or even about the omission of an instruction on one element that would be difficult for a juror to intuit. Mr. Adams' complaint is that no elements of the underlying felonies were revealed to the jury.

The trial judge herein merely listed the names of the underlying felonies. This laundry list recited each felony which could form the basis of a finding of felony-murder. The instruction in no way informed the jury of what the crimes were and what the state had to prove.

Certiorari should be granted on this issue. The Circuit Court misinterpreted Stromberg, to conclude that premeditated murder was the basis for the jury verdict. As discussed in Argument I, premeditation was a hotly contested and close issue. If the Circuit Court is wrong on Stromberg, the verdict must be reversed. Given the evidence, a juror may have very well welcomed a ground for conviction that required little evidentiary analysis. Convicting someone of murder based on some undefined felony is the path of least resistance, and there is nothing in this record to show the jury did not so short-circuit the deliberative process. A verdict based on such an instruction (or lack of instruction) cannot stand, Kibbe, Glenn, and if the verdict could have been so based, as here, reversal is required. Stromberg.

B. Death Penalty.

The error was exacerbated at sentencing, but the Circuit Court used guilt-innocence, fourteenth amendment analysis, not eighth amendment analysis, to resolve the issue. The distinction makes a difference.

It helps to recall that equipoise prevailed in the number of statutory mitigating and aggravating circumstances found by the sentencing judge. Injected as it was, into that fragile

balance, the jury recommendation of death surely helped tip the scales against Petitioner. Any error in the jury recommendation process must consequently be critically analyzed.

The jury was instructed that "[o]ne of the three aggravating factors [they could consider] was [whether] the killing had occurred during the commission of, or an attempt to commit, rape or kidnapping. Again, however, the trial court did not define the elements of these felonies." Adams, 764 F.2d at 1364.

The Circuit Court acknowledged that this was error, but then used fourteenth amendment Kibbe language to ward off reversal: under the fourteenth amendment, the effect of the error was termed "too speculative to justify the conclusion that constitutional error was committed." 764 F.2d at 1365, quoting Kibbe. What may be "too speculative under the fourteenth amendment" to disturb a jail sentence, Kibbe, may nevertheless be sufficiently "speculative" to destroy the reliability of a sentence of death. The Circuit Court used "jail sentence" language to validate a very different type of punishment -- death. As this Court has repeatedly held, any risk of error in a capital case must rest with the state, and validating a death sentence based upon its degree of "speculativeness" is untenable.

Beck v. Alabama, 447 U.S. 625 (1980), makes the point. In Beck, this Court ruled that guilt-innocence procedures which were not required "as a matter of due process" could nevertheless be required by the eighth amendment if failure to follow them "diminished reliability." Although the Circuit Court herein admitted sub silencio that there was some speculation necessarily attendant with the jury recommendation of death when the jury was allowed to consider undefined felonies in aggravation of punishment, the court believed that the speculation that it was prejudicial was too great to cause a fourteenth amendment violation. That is not a sufficient analysis.

The harm here is acute. The jury was allowed to convict on a felony-murder theory, without being provided any definitions of the underlying felonies. The jury was then allowed to

consider undefined felonies in statutory aggravation. Based upon this procedure, the jury recommended death. The judge took this recommendation into consideration when weighing and balancing the three statutory mitigating and three statutory aggravating circumstances. If we must characterize the complaint as too speculative in order to dismiss it, then the sentencing procedure is and was inherently unreliable. Certiorari is appropriate to correct the Circuit Court's inappropriate use of a due process case and analysis to defeat an eighth amendment claim. U.S. Sup.Ct. R 17.

III. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE APPLICATION OF THE AGGRAVATING CIRCUMSTANCE 'ARREST AVOIDANCE' BECAUSE ITS APPLICATION HERE REFLECTS SUCH A BROAD AND VAGUE CONSTRUCTION THAT IT VIOLATES THE EIGHTH AMENDMENT AND THE COURT OF APPEAL'S DECISION IS IN CONFLICT WITH GODFREY V. GEORGIA.

A statutory aggravating circumstance may be constitutional on its face but unconstitutional as applied. In this case, there was an unconstitutional application of an aggravating circumstance (commission of a capital felony to avoid arrest) for two reasons. First, the evidence is insufficient to establish the circumstance beyond a reasonable doubt as required by the fourteenth amendment. Jackson v. Virginia, 443 U.S. 307 (1979). Second, if the evidence does establish this aggravating circumstance, there is no meaningful basis for distinguishing this case, in which the aggravating circumstance and death penalty has been imposed, from the other cases in Florida in which it has not, and hence there is a violation of the eighth

amendment. Godfrey v. Georgia, 446 U.S. 420, 427-28 (1980).[25]

The application of a statutory aggravating circumstance must be overseen by the state supreme court to ensure that it truly channels sentencing discretion and is not an automatic aggravating circumstance which arises in every homicide. Godfrey. The Florida Supreme Court failed in this case to assure that this aggravating circumstance was constitutionally applied. The arbitrary application of the avoidance of arrest aggravating circumstance under the facts of this case is clearly demonstrated by comparing this case to Doyle v. State, 460 So.2d 353 (Fla. 1984). In Doyle, under very similar facts, the Florida Supreme Court invalidated an avoidance of arrest finding. Doyle was decided the month after Mr. Adams received a stay from the Eleventh Circuit, and demonstrates the arbitrariness of the finding here.

Although the Circuit Court below characterized the issue in Doyle as one of insufficient evidence (fourteenth amendment analysis), rather than an arbitrary application of the death penalty (eighth amendment analysis), the Circuit Court would apparently have reached the same conclusion (that Doyle was dissimilar) whether it applied a fourteenth amendment analysis under Jackson or an eighth amendment analysis under Godfrey. However, if this case and the Doyle case are not distinguishable

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[25]While any risk of error at capital sentencing must be policed at every juncture, this case involves unique findings at sentencing which suggest that an especially vigilant concern is proper. This was twenty-year-old Dennis Adams' first offense. The trial court found compelling evidence in mitigation, including the fact that the offense was committed during a time when Mr. Adams was under the influence of extreme mental or emotional disturbance. The judge also found Mr. Adams' age (20) and insignificant history of criminal conduct to be mitigating.

Balanced against this mitigation was the judge's finding of three statutory aggravating circumstances. The invalidation of any of the aggravating circumstances should result in a life sentence in this case, or at least a new trial court balancing of these circumstances. Thus, there must be a highly tuned examination of the validity of the statutory aggravating circumstances.

The death penalty was deemed inappropriate in this case by two justices of the Florida Supreme Court. Of particular relevance to the instant claim is Justice McDonald's opinion in state post-conviction that the support for the arrest avoidance aggravating circumstance was "highly questionable."

and the decision in Doyle is based on insufficient evidence, the court should have invalidated the same avoidance of arrest circumstances in this case on the same grounds it invalidated it in Doyle. In fact, it is impossible to meaningfully distinguish Doyle from this case. Therefore, this Court should grant certiorari to review the Eleventh Circuit's opinion regarding this issue.

A. Jackson v. Virginia -- The Evidence Does Not Support This Aggravating Circumstance.

The standard that Florida has established for the finding of the aggravating circumstance of commission of a capital felony to avoid arrest is that it must be clearly shown that the dominant or only motive for the murder was the elimination of witnesses." Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979).[26] There is no rational basis for a finding that the evidence in this case shows that the dominate or only motive for the murder was to eliminate the victim as a witness.

The evidence upon which the Circuit Court relied in upholding this aggravating circumstance was a written confession which states that Mr. Adams put his hand over the victim's mouth to silence her screaming, and she quit breathing.[27] The Circuit Court apparently believed Mr. Adams murdered the victim to stop screaming, which would avoid detection. However, no Florida court or any attorney for the State of Florida had previously advanced this theory of the victim's death. The Florida Supreme Court specifically held:

> The evidence is sufficient to sustain a finding that the death was caused by strangulation, not by the defendant placing his hand over the mouth of the victim so as to keep her from screaming or yelling.

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[26]See also Doyle, 460 So.2d at 358 (Fla. 1984); White v. State, 403 So.2d 331, 338 (Fla. 1981).

[27]The only other factor cited by the Eleventh Circuit as a basis for its decision is that "the present case involves a charge of kidnapping as well as rape." Adams, 764 F.2d at 1366. Such a finding is totally inconsistent with the court's ruling on the Stromberg issue that there was no charge of kidnapping given to the jury. Id. at 1362-63.

Adams, 412 So.2d at 852.[28] This theory has also been rejected by the attorneys for the State of Florida as untrue.[29]

Under any theory, the evidence on this issue cannot be fairly characterized as sufficient to have led any rational trier of fact to find beyond a reasonable doubt that this aggravating circumstance existed.[30] Jackson v. Virginia, 443 U.S. 307 (1979).

The fact that the evidence is insufficient to sustain this finding is illustrated by the various unsupported and contradictory "facts" relied upon by the Florida courts, the federal district court and the Eleventh Circuit to uphold this finding. At every stage, the claimed evidentiary basis for the aggravating circumstance has shifted. The plain facts are that the time, place, and manner of death is unknown, and the assignment of a "primary motive" for the death is nothing less than arbitrary. The courts have played "multiple choice" with this aggravating circumstance by speculating about various inconsistent hypothesis which allegedly would support the finding. None of the speculative basis are constitutionally sufficient.

The Circuit Court in a manner similar to the Florida

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[28]It was a total misapplication of existing precedent for the Eleventh Circuit to overturn a factual finding of the Florida Supreme Court in order to uphold a decision of the Florida Supreme Court which was otherwise erroneous.

[29]Indeed, the State strongly asserted at trial, especially in closing arguments, that death was caused by strangulation and not by Petitioner placing his hands over the victim's mouth. (Ex. 8 at 1310). In its Brief to the Court of Appeals, in arguing that the evidence supported a conviction based on premeditated murder, the State makes the statement:

> The evidence was sufficient to sustain a finding that the death was caused by strangulation, not by the defendant placing his hand over the mouth of the victim, so as to keep her from screaming or yelling.

State's Brief at 17 (emphasis added). The point, of course, is not strangulation or suffocation but whether reducing screams was the purpose of the murder. Only the Eleventh Circuit panel has come up with this theory, and Petitioner believes there is no evidence in the record to support such a finding.

[30]It is clear that the Florida Supreme Court considered this aggravating factor in its review of the propriety of the death penalty. Consequently, the balancing process created by Fla. Stat., § 921.141, was infected by the court's application of an arbitrary and capricious standard. Godfrey, 446 U.S. at 428.

Supreme Court and the federal district court, has inserted and deleted "facts" in an effort to sustain the finding of the aggravating circumstance in question. Petitioner is endlessly fielding the ever changing speculation supporting the finding. The state trial court found the aggravating factor solely because it found Petitioner committed or attempted to commit a kidnapping and/or rape, and that the victim's death prevented her from testifying. (Ex. 25 at 12). Since this could not be a basis to distinguish this capital offense from any other one, the Florida Supreme Court apparently and justifiably believed that such facts were insufficient to uphold the aggravating circumstance, so it relied on the additional facts that the victim knew Mr. Adams and her body was "hidden" (at a frequented garbage site).[31] Adams, 412 So.2d at 856. The district court below relied on the assertion that a kidnapping and rape had occurred[32] and then concluded, without explaining why, that the murder was to prevent Mr. Adams' discovery and conviction. No facts were cited for the basis of the district court's conclusion. Adams v. Wainwright, No. 84-170-CIV, Slip op. at 10-11 (M.D. Fla. Sept. 18, 1984).

The Circuit Court apparently also recognized that the evidence relied on by previous courts was insufficient to establish this aggravating circumstance and therefore cited a previously unrelied upon "fact," a portion of a written statement by Mr. Adams which states "that he put his hand over the victim's mouth to silence her screaming, and she quit breathing." Adams, 764 F.2d at 1366. As previously noted, the inclusion of this additional factor is a novel proposition

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[31]The hiding of the body was later specifically rejected by the Eleventh Circuit as too ambiguous to serve as a basis for upholding this aggravating circumstance. Id. at 1365 n. 9.

[32]No Florida court, however, has found that kidnapping and rape occurred. Instead, they have only found that Petitioner committed or attempted to commit rape and/or kidnapping. Adams v. State, 412 So.2d 850 (Fla. 1982). It is ironic (and telling) that the courts have consistently rejected the motion that the jury could have convicted Petitioner on sex offense grounds, while embracing sex offense as a sufficient basis for the finding of this statutory aggravating circumstance.

first advanced by the Circuit Court.[33]

The pervasive allegations and findings of rape or sex offense in this case also negate a finding of murder to avoid detection. Petitioner continues to maintain that the evidence was insufficient to support a finding of sex offense. Nevertheless, the State argued it, and the jury was instructed at guilt-innocence in such a way as to allow them to convict Petitioner of felony (sex offense) murder. If sex offense/rape was indeed the predicate for the murder, then this aggravating circumstance is unsupportable. As the Florida Supreme Court has recently stated:

> It is a tragic reality that the murder of a rape victim is all too frequently the culmination of the same hostile-aggressive impulses which triggered the initial attack and not a reasoned act motivated primarily by the desire to avoid detection.

Doyle, 460 So.2d at 358.[34] The result of this unfortunate, but true, finding is that there is no logical basis for the conclusion that this aggravating circumstance has been proven beyond a reasonable doubt.

The Court Court also asserted that the Florida Supreme Court's concern in Doyle, (that the murder could have been the culmination of the same impulses that prompted the rape), is not present in this case because Mr. Adams was charged with kidnapping as well as rape. Adams, 764 F.2d at 1366. This

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[33]If this Court finds this statement to be true, then the State has failed to prove that the victim was killed by the means set forth in the indictment--strangulation. Jiminez v. State, 231 So.2d 26 (Fla. 3d DCA 1970); State v. Ryan, 413 So.2d 411 (Fla. 4th DCA 1982).

[34]The Circuit Court appears to be under the impression that Petitioner is asserting that rape occurred and that strangulation occurred as an integral part of the rape. This is not correct. Petitioner believes that there is no evidence of rape but if rape occurred, the motive for the killing could be as in Doyle. As in Doyle, the court cannot assume or speculate that the motive was to avoid arrest and the avoidance motive was not proven beyond a reasonable doubt. The Circuit Court also stated that Petitioner is asserting that the aggravating factor of killing during the commission of actual or attempted rape and killing to avoid detection and arrest are mutually exclusive. This is also incorrect. They are not mutually exclusive, but because of the nature of rape, and if a rape occurred, the State of Florida has not proven beyond a reasonable doubt that the primary motive for the murder was to prevent detection. Doyle, 460 So.2d at 353.

statement is totally inconsistent with the Circuit Court assertion in disposing of Petitioner's Stromberg claim that the jury could not have found Petitioner guilty of felony-murder because there was allegedly no charge to the jury on felony-murder. Furthermore, as noted above, the trial court found that Petitioner committed or attempted to commit kidnapping and/or rape. Thus, there has been no factual finding by any Florida court that a kidnapping actually occurred.

It must also be emphasized that, simply because a kidnapping occurs in connection with rape, or attempted rape, this does not mean that the hostile-aggressive impulses associated with rape did not occur. Furthermore, the fact that the victim was transported from one location to another does not dispel the distinct possibility that the attempted rape and murder was committed at one location, the result of a single incident of impulsive violence and it is mere speculation to assert otherwise.[35] The distinctions enumerated by the Circuit Court to justify the application of the avoidance motive are simply not supported by the evidence.[36]

B. Godfrey v. Georgia - This Aggravating Circumstance Was Arbitrarily Applied.

The arbitrariness of the application of this circumstance is illustrated by an analysis of the findings in Doyle v. State,

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[35]The lower court's assertion that this is what occurred in Doyle is an assumption which is not contained in the Doyle opinion. Furthermore, under Fla. Stat. §787.01, in order to find kidnapping in this case, the court has to find that the acts in question were for the purpose of committing rape. In fact, little is known of the events immediately preceding the murder. For example, it is not known where the murder took place. Despite the lack of supporting evidence, the decision below allows the sentencer the opportunity to assume the Petitioner's state of mind even when significant facts are not known. Allowing such an assumption to serve as the basis for applying the death penalty is impermissible under the "clear and objective standards" requirement of Godfrey.

[36]The standard for weighing the constitutional sufficiency of the evidence is set forth in Jackson v. Virginia, 443 U.S. 307, 324 (1979). Under Jackson, "[T]he applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial, no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Here, no rational trier of fact could have found proof of the avoidance motive was the dominate or only motive for this murder and that it was proven beyond a reasonable doubt based on the evidence in this record.

460 So.2d 353 (Fla. 1984). In Doyle, the appellant was convicted of first degree murder and sexual battery. The victim was a neighbor and relative of the appellant. The victim's body was discovered in an area where the appellant had been dumping tree branches and leaves. The similarities between the circumstances of death in Doyle and the circumstances of death in Adams are readily apparent. Both cases involve the alleged sexual assault of females and the victims knew the defendants. In both cases, it also appears that the bodies were concealed.[37]

Despite the obvious similarities between the two cases, the Florida Supreme Court reversed the trial court's finding regarding the existence of the aggravating factor of avoiding arrest in Doyle but not in Adams. Allowing the application of the aggravating factor in Adams but disallowing it in Doyle cannot be reconciled, except by recognizing the arbitrary application of this factor in the Adams case.[38]

Florida's control of this aggravating circumstance is unconstitutionally inconsistent. In Menendez v. State, 368 So.2d 1278 (Fla. 1979), the State argued that a murder committed by means of a pistol fitted with a silencer indicated a motivation to avoid arrest and detection. The court held that the presumption "carries us too far." Significantly, the court noted that the court could not assume the defendant's motive because "[h]ere, unlike Riley, we do not know what events preceded the actual killings...." Id. at 1282. Menendez correctly recognizes that a sentencer may be afforded too much discretion in cases where little is know of the events preceding the murder. Such discretion fails to adequately channel the sentencer's decision making. Godfrey, 446 U.S. at 428.

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[37]In Doyle, the body was discovered only after a search of an area that was conducive to concealing a body. This is demonstrated by the discovery of a skeleton of another body which was discovered in the same area only after the search for the victim began.

[38]The application of this aggravating factor in this case clearly concerned Justice McDonald. In his dissenting opinion to the denial of Petitioner's post-conviction motion, he specifically referred to the "...highly questionable aggravating factor that Adams killed the eight-year-old to avoid arrest...." Adams v. State, 456 So.2d 888, 891 (Fla. 1984).

Similarly, in this case, little is known about the facts preceding the killing. Previous decisions regarding this case have relied extensively on facts occurring after the killing (i.e., disposing of the body in a desolate area, encasing the body, effectively concealing the body for a period of time), Adams, 412 So.2d at 856, as opposed to before the killing.

Accordingly, the clear and objective standards envisioned in Godfrey are not achieved from the result in this case in light of Doyle, Menendez, and the Florida Supreme Court's recognition that "the murder of a rape victim is all too frequently ... not a reasoned act motivated primarily by the desire to avoid detection." Doyle, 460 So.2d at 358.

Using the standard applied in this case, some judges and juries will recommend death based on the existence of the facts in this case, (e.g., Adams) and others will not (e.g., Doyle and Menendez), and the Florida Supreme Court will stand silent. The standard applied here provides no guidance to a jury or judge to determine when they should or should not recommend death in these circumstances, and the Florida court has failed in its appellate function of ensuring that there is a meaningful basis for distinguishing those cases where the death penalty is imposed from those where it is not. The result is that the death sentence in this case cannot be allowed to stand. The Eleventh Circuit's decision constitutes a clear violation of the principles of Godfrey and should be reviewed by this Court.

IV. THIS COURT SHOULD CORRECT THE CONFUSION AND CONFLICTS IN STATE AND FEDERAL DECISIONS AND EXPLAIN THAT THE EIGHTH AMENDMENT REQUIRES CAPITAL SENTENCING JURY INSTRUCTIONS WHICH CLEARLY AND EXPLICITLY INFORM JURORS OF THEIR OPTION TO RECOMMEND A SENTENCE OF LIFE IMPRISONMENT, AND THIS COURT SHOULD CORRECT THE ELEVENTH CIRCUIT'S INCORRECT DETERMINATION IN THIS CASE THAT THE JURY WAS ADEQUATELY INFORMED OF THE MERCY OPTION.[39]

This Court has held that the eighth and fourteenth amendments require that the capital sentencer not be precluded from considering as a mitigating factor any aspect of the defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for sentence less than death.[40] Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion); Bell v. Ohio, 438 U.S. 637, 642 (1978) (plurality opinion). Lockett holds that a jury should be allowed to base its sentence on any "factor[s] which may call for a less severe penalty," even though the mitigating factors do not outweigh the aggravating circumstances.[41] 438 U.S. at 605. Cf. Woodson v. North Carolina, 428 U.S. 280 (1976); King v. Mississippi, 461 U.S. 919 (1983) (Marshall, J., dissenting from denial of

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[39]This claim is presented here directly on the merits. Below, Petitioner presented this point mainly as an ineffective assistance of counsel claim, but noted that the claim should be considered directly on the merits because it involved fundamental constitutional error to which procedural default does not apply. See Petitioner's Eleventh Circuit Initial Brief at 51 n. 13, citing Spivey v. Zant, 661 F.2d 464, 470 (5th Cir. Unit B 1981), cert. denied, 458 U.S. 1111 (1982), and Chenault v. Stynchcombe, 581 F.2d 444, 447 (5th Cir. 1978). Petitioner reasserts that the claim should be considered directly on the merits. Should this Court disagree, Petitioner reasserts counsel was clearly ineffective for failing to raise the point since it involves such fundamental constitutional error.

[40]The Constitution requires that a state death sentencing procedure "allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (plurality opinion). See also Eddings v. Oklahoma, 455 U.S. 104, 113-15 (1982).

[41]A jury's unfettered option to recommend life regardless of aggravating circumstances does not result in the unbridled discretionary determinations found wanting in Furman v. Georgia, 408 U.S. 238, 262-63 (1972) and successor cases. See, e.g., Bullington v. Missouri, 451 U.S. 430 (1981) (where there was a Missouri statute giving the jury the option to recommend life, the Court never intimated unconstitutionally); and Gregg v. Georgia, 428 U.S. 153, 199 (1976) (per curiam) ("nothing in any of our cases suggest that the decision to afford an individual defendant mercy violates the Constitution.")

certiorari).

Three members of this Court have previously addressed the issue of whether and how jury instructions must elucidate mercy as a legitimate sentencing criteria. For instance, in Teague v. Tennessee, ___ U.S. _____, 105 S.Ct. 3538 (1985) (Marshall and Brennan, JJ., dissenting from denial of certiorari), Justice Marshall examined the Tennessee statute which provides that once the state proves an aggravating circumstance, the jury has to impose the death penalty, unless they find mitigating circumstances which in fact outweigh the aggravating circumstances. Citing Lockett and Woodson, Justice Marshall emphasized that "a jury must always be free to confront the ultimate question of whether 'death is the appropriate question' in the specific case, even where mitigating factors do not outweigh aggravating factors." Id. at 3539 (emphasis added) (citations omitted). Justice Marshall went on to note that the jury "may wish to vote for life out of a desire to render mercy, or it may believe that the death penalty is simply inappropriate for the specific crime the defendant has committed." Id. Justice Marshall recognized that the statute was likely to mislead sentencing jurors into believing that only the mitigating factors they could label and weigh against aggravating ones could properly be considered.

Similarly, in Smith v. North Carolina, 459 U.S. 1056 (1982), Justice Stephens, writing respecting denial of certiorari, stated that the jury might find under North Carolina's statute that there were "sufficient" aggravating circumstances to impose the death penalty, and the aggravating circumstances outweighed the mitigating circumstances. Nevertheless, he noted the jury might feel that a comparison of the totality of the factors left it in doubt as to the proper penalty. Yet, under the North Carolina law in question, the jury would be

required to impose the death penalty.[42] See also, dissents of Justice Marshall and Brennan, White v. Maryland, ___ U.S. __, 105 S.Ct. 1779 (1985); Maxwell v. Pennsylvania, ___ U.S.___, 105 S.Ct. 370 (1984); Stebbing v. Maryland, ____ U.S. ____, 105 S.Ct. 276 (1984); Jones v. Illinois, ___ U.S. ___, 104 S.Ct. 287 (1983); and King v. Mississippi, 461 U.S. 919 (1983).[43]

A. A Conflict Exists on the Mercy Question.

The Fourth[44] and Fifth[45] Circuits, and prior decisions of the Eleventh[46] Circuit have recognized that a jury must be clearly informed of its option to recommend life, even in the face of aggravating circumstances. These decisions have relied on this Court's precedents cited and discussed above.

The Fifth Circuit has read Lockett and Bell to mandate that the judge clearly and affirmatively instruct the jury about the option to recommend against death. Chenault v. Stynchcombe, 581 F.2d 444, 448 (5th Cir. 1978); Spivey v. Zant, 661 F.2d 464, 467-72 (5th Cir. Unit B 1981), cert. denied, 458 U.S. 1111 (1982).[47] Similarly, the Eleventh Circuit has followed its predecessor circuit (the Fifth Circuit) and read Lockett and Bell to require clear and explicit instructions on

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[42]Justice Stephens respected the denial of certiorari for reasons apparently unrelated to the merits. The case was on a direct appeal so the question would still be open for the Court for consideration in collateral proceedings. Id. 459 U.S. at 1057.

[43]Of course, it is Hornbook law that denials of writs of certiorari have no precedential value and the denial of certiorari is not a comment on the merits in the case. See Stebbing v. Maryland, ____ U.S.____, 105 S.Ct. 276 (1984) (Marshall, J., dissenting from denial of certiorari).

[44]Briley v. Bass, 750 F.2d 1238, 1242-44 (4th Cir. 1984).

[45]Spivey, 661 F.2d at 471 and cases cited therein.

[46]Tucker v. Zant, 724 F.2d 882, 891 (11th Cir. 1984), affirmed and considered en banc on other grounds, 762 F.2d 1480, (11th Cir. 1985) and cases cited therein.

[47]In Spivey, the instruction which was held to be unconstitutional contained the same "sufficient" language which was used by the court of appeals in the instant case to uphold the jury instructions (the instant instructions said the jury could consider death if they found "sufficient" aggravating circumstances). Thus, there is a clear conflict between Spivey and the instant case. See pp. 47-50, infra. For a similar case, disapproving almost identical "sufficient" language, see Ruffin v. Zant, 591 F.Supp. 1136, 1140 (S.D. Ga. 1984).

the option to recommend against death. Goodwin v. Balkcom, 684 F.2d 794, 801 (11th Cir. 1982). The instant case reflects the Eleventh Circuit's inconsistent application of this eighth amendment mandate. The Eleventh Circuit's resolution of the issue sub judice conflicts with Fifth Circuit decisions, and this Court's decisions.

Leading decisions of the various states are also in conflict on this point.[48] Similarly, state statutes which address the point are in conflict with decisions of this Court and the Circuit Court opinions cited above.[49] This Court's mandate is necessary since the application of the death penalty is proceeding upon different rules, depending on where the crime occurred or the trial is held--rules which go to the heart of the eighth amendment.

B. The Circuit Court Approved Sentencing Instructions Which Failed to Clearly Inform the Jury of Its Eighth Amendment Mercy Power.

The Circuit Court held that the instructions in this case neither expressly nor implicitly "foreclosed" the jury's ability to exercise mercy and recommend a life sentence. Adams, 764 F.2d at 1368. An analysis of the instructions shows

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[48]Leading cases supporting instructing the jury as to their option to recommend mercy are: People v. Lanphear, 36 Cal.3d 163, 203 Cal. Rptr. 122, 680 P.2d 1081 (1984); People v. Robertson, 33 Cal.3d 21, 58, 188 Cal. Rptr. 77, 655 P.2d 279 (1982); Whalen v. State, 492 A.2d 552, 560-63 (Del. 1985); High v. Zant, 250 Ga. 693, 300 S.E.2d 654, 662 (1983); Smith v. Francis, 253 Ga. 782, 325 S.E.2d 362, 365 (1985); Briley v. Commonwealth, 221 Va. 532, 273 S.E.2d 48 (1980); and State v. Quinlivan, 81 Wash.2d 124, 499 P.2d 1268 (1972).

Cases not supporting the option (despite frequent strong and persuasive dissents) are: State v. Stewart, 104 Ill.2d 463, 473 N.E.2d 1227 (1985); State v. Sully, 219 Kan. 222, 547 P.2d 344 (1976); State v. Watson, 449 So.2d 1321, 1331-32 (La. 1984); Hill v. State, 432 So.2d 427, 441-42, 452-457 (Miss. 1983); Nevius v. State, 699 P.2d 1053 (1985); State v. Williams, 308 N.C. 47, 301 S.E.2d 335 (Nev. 1982); and State v. Jenkins, 15 Ohio St.3d 164, 473 N.E.2d 264 (1984).

[49]There are several states such as Mississippi, Illinois, North Carolina, Pennsylvania and Tennessee which have statutes or jury instructions which do not advise the jury of their option to recommend life, but instead, require the jury to impose the death penalty once they find aggravating circumstances which are not outweighed by mitigating circumstances. See this Court's decisions cited above, and the statutes cited therein.

this holding not only conflicts with prior decisions of this Court and decisions of other circuits but is also incorrect and conflicting even when applying prior decisions of other panels of the Eleventh Circuit.

(1) The Improper Jury Instructions Given Below.

In relevant part, the improper charge to the jury was:

> If you do not find that there existed sufficient[50] of the aggravating circumstances which have been described to you, it will be your duty to recommend a sentence to life imprisonment.
>
> Should you find sufficient number of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.

(B-4) (emphasis added).[51]

More importantly, while explaining the sentencing phase of trial to prospective jurors during jury voir dire, the trial judge repeatedly told the jury they should weigh aggravating and mitigating circumstances before deciding whether to recommend life or death, and that if aggravating outweighed mitigating, the jury should recommend death. See the trial transcript, Ex. 2 at 30, 127; and Ex. 3 at 231.[52] The judge never advised the jury in any way of the option to recommend life imprisonment even if they found only aggravating circumstances or that the aggravating outweighed the mitigating circumstances.

Several jurors who were ultimately impaneled were in the

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[50] See n. 58, supra as to the inherent ambiguity of the word "sufficient".

[51] See pp. B-2, B-4, and B-6 of the Appendix for the total charge relating to this issue.

[52] For example, after generally defining aggravating and mitigating circumstances, the trial judge stated:

> [Y]ou would then find whether or not, in your opinion, the aggravating circumstances outweigh the mitigating circumstances and, if so, then you would come back and recommend to the Court that this man be put to death. If you found that the mitigating circumstances outweighed the aggravating circumstances, you would come back and recommend to the Court that the Court give him life.

Ex. 2 at 30 (emphasis added). The other explanations were similar. See Ex. 2 at 127 and Ex. 3 at 231.

jury box from the beginning of voir dire and heard all of the repeated explanations.[53]

(2) The Appropriate Standard Regarding Such Instructions.

As discussed above, this Court has indicated that jurors should not be limited in their power to entertain and exercise mercy. The proper standard to be used in analyzing the instructions as to the option to recommend life issue has thus far been left to other courts. Consistent with this Court's opinions, the Fifth Circuit has adopted the following standard: "the judge must clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death." Spivey v. Zant, 661 F.2d 464, 471 (5th Cir. Unit B 1981), cert. denied, 458 U.S. 1111 (1982) (emphasis added). This requirement of explicitness and clearness has permeated the Eleventh Circuit cases[54] dealing correctly with this issue.[55]

A corollary to the clear and explicit requirement is that the instruction be clear and explicit to a reasonable juror.[56] In this regard, it is important to note that: "[A] jury will have had little, if any, previous experience in sentencing, [and] they are unlikely to be skilled in dealing with the information they are given." Gregg v. Georgia, 428 U.S. 153,

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[53]Compare Ex. 3 at 343-44 (which lists the twelve jurors actually impaneled) with Ex. 2 at 6-7, 122 and 221 (which shows that eight of twelve jurors heard all or part of these improper instructions given at 30, 127 and 231).

[54]See, e.g., Goodwin v. Balkcom, 684 F.2d 794, 801 (11th Cir. 1982), cert. denied, 460 U.S. 1098 (1983) (the rule requires "explicit" instructions); Chenault v. Stynchcombe, 581 F.2d 444, 448 (the trial judge must "clearly" instruct the jury); and Moore v. Zant, 722 F.2d 640, 646 (11th Cir. 1983) ("this Court has repeatedly emphasized that a trial judge 'must clearly and explicitly instruct the jury about ... the option to recommend against death.'")

[55]The policy reasons for the rule requiring clear and explicit instructions were fully and soundly explained in Spivey. They concern the seriousness of the death penalty, the avoidance of arbitrariness in death sentence cases and the constitutional responsibility to tailor any sentence in a capital case to the defendant's particular circumstances. See Spivey, 661 F.2d at 469-72 and cases cited.

[56]See, e.g., Corn v. Zant, 708 F.2d 549, 562 (11th Cir. 1983) and Tucker v. Zant, 724 F.2d 882, 891 (11th Cir. 1984), affirmed and considered en banc on other grounds, 762 F.2d 1480, (11th Cir. 1985).

192 (1976) (plurality opinion). This is especially true in Petitioner's case: the jury did not have the opportunity to closely analyze each word as the Circuit Court and the district court have previously done because the instructions were orally read only once to the jury.[57]

(3) The Circuit Court Holding is Clearly Erroneous and Conflicts Even with Prior Eleventh Circuit Opinions.

That the instant Circuit Court did not apply the proper standard is shown by the fact that nowhere did the Court mention the constitutionally required "clear and explicit" standard. Instead, the court held the instructions "neither expressly nor implicitly foreclosed the jury's ability to exercise mercy and recommend a life sentence." Adams, 764 F.2d at 1368 (emphasis added). It is simply not enough that the instructions not "foreclose" the option--instead they must affirmatively, explicitly, and clearly advise the jury of their option to recommend life imprisonment even though the jury finds aggravating circumstances or that aggravating circumstances outweigh the mitigating circumstances.

In determining that the jury was not foreclosed, the Circuit Court relied on the fact that the instructions said life imprisonment should be recommended if the jury did not find that "sufficient" aggravating circumstances existed. This is error for three distinct reasons.

First, it is unclear to a reasonable juror what the word "sufficient" defines in the above charge.[58]

Second, as set forth at text pages 46-47 above, the trial judge, while explaining the sentencing phase during voir dire

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[57]In most of the cases discussed herein where instructions on this issue were approved as constitutional (see for instance, the discussion of Spivey and Westbrook below) the jury had the luxury of having the instruction before them in writing.

[58]Does "sufficient" refer to: (1) a sufficient "number" of aggravating circumstances (see the word "number" at B-4 and quoted above); or (2) does "sufficient" mean that the aggravating circumstances must be sufficient beyond a reasonable doubt; or (3) does "sufficient" mean that if the aggravating circumstances are sufficient to outweigh the mitigating circumstances, then death should be recommended? The answer is unclear, especially to a lay jury who hears (not reads) the instruction only once.

repeatedly told the jury they must weigh aggravating and mitigating circumstances before deciding to recommend life or death, and that if aggravating outweighed mitigating the jury must recommend death. Not once, during all of these repeated instructions did the judge ever mention any requirement that the aggravating circumstances had to be "sufficient" to impose death before they were required to weigh mitigating circumstances. Thus, if the jury found any aggravating circumstances at all (whether or not "sufficient" to impose death) they would have felt compelled to impose death if they found no mitigating circumstances or that the mitigating circumstances did not outweigh the aggravating circumstances found.[59]

Third, it is not enough to simply tell the jury that they should recommend life if they do not find "sufficient" aggravating circumstances. The jury should be advised that they can exercise mercy even if the aggravating circumstances are "sufficient" to impose death.

Rather than being given a clear instruction on the option to recommend life despite aggravating circumstances, the jurors were given just the opposite impression, because they were repeatedly instructed that if sufficient aggravating circumstances were found, they must find mitigating circumstances that outweigh them before they could recommend life.[60] At best, the instructions are subject to differing interpretations. At worst, the instructions affirmatively charged the jury

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[59]These early instructions would have had a much higher impact on the jury than the later final charge given. It was the juror's first impression of the case and it was repeatedly given.

[60]In addition to the repeated early voir dire instructions, the jury was instructed three more times during the final charge that if sufficient aggravating circumstances were found, they must consider whether mitigating circumstances existed to outweigh the aggravating circumstances before they could recommend life (B-2, B-4, B-6).

incorrectly.[61] Due process in a death penalty case requires more.[62]

Last year, in Morgan v. Zant, 743 F.2d 775 (11th Cir. 1984), the Eleventh Circuit addressed a similar instruction. The relevant instruction in Morgan was:

> I charge you that before you would be authorized to find a verdict fixing a sentence of death by electrocution for the offense of murder, you must find upon the evidence statutory aggravating ... circumstances sufficient to authorize such penalty.

Id. at 778 n. 1 (emphasis added). The similarities in this instruction to the instruction in the instant case are obvious. Both refer to the necessity of finding "sufficient" aggravating circumstances before death can be recommended. Neither instruction explicitly (or even implicitly) tells the jury of their option to recommend mercy. Yet, the instruction in the instant case was upheld while the instruction in Morgan was rejected, Morgan, 743 F.2d at 779.[63]

All but one of the Eleventh Circuit cases upholding jury instructions as properly advising as to the option to recommend

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[61]Prejudice can be easily perceived in the instant case. The aggravating and mitigating factors found by the trial judge were closely balanced three to three. The jury may have felt that the aggravating circumstances outweighed the mitigating, but yet desired to recommend life. Nevertheless, because of the instructions, the jurors were foreclosed from recommending life if the aggravating slightly outweighed the mitigating. By a bare margin, the Florida Supreme Court upheld the death sentence (4-2 decision).

[62]The error below is not merely a technical one. Despite all the constitutional and procedural safeguards in capital cases, the state may be wrong. See, e.g., Leatherwood v. State, 435 So.2d 645, 662 (Miss. 1983) (Robertson, J. dissenting) noting that "jury nullification" has been a part of the criminal justice system for hundreds of years, and then listing a sampling of six documented cases in which death sentences were imposed, though not carried out, upon persons later found not guilty. In addition, there may be non-fact considerations which render it clear beyond a reasonable doubt that the Defendant's life should be spared. The jury must be allowed to dispense mercy on the basis of factors too intangible to write into a statute or jury instruction. See Gregg v. Georgia, 428 U.S. 153, 222 (1976). A jury's decision necessarily implicates the most fundamental notions concerning the uniqueness, dignity, and worth of a human being. The juror's unique sense of justice and fairness as reflected by societal standards is always tested.

[63]For other cases disapproving instructions similar to or even clearer than the instant case, see Goodwin, 684 F.2d at 794 and Spivey, 661 F.2d at 464. Note especially the use of the word "sufficient" in the instructions in those cases.

life were upheld only because, unlike the instant case, the instructions at issue contained clear and explicit language advising the jurors of their option to recommend life.[64]

These decisions illustrate the need for this Court to (1) clarify and reaffirm that instructions must clearly and explicitly advise the jury of the option to recommend life; and (2) closely review the jury instructions in the instant case and hold they did not properly advise the jury of the option to recommend mercy.

V. PETITIONER WAS IMPROPERLY DENIED AN EVIDENTIARY HEARING ON HIS CLAIM THAT HE WAS INCOMPETENT TO STAND TRIAL AND BE SENTENCED TO DEATH, AND ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AND THE CIRCUIT COURT OPINION CONFLICTS WITH TOWNSEND V. SAIN, 372 U.S. 293 (1963).

A. Petitioner Was Improperly Denied An Evidentiary Hearing Regarding His Incompetence to Stand Trial And His Incompetence to Participate in The Sentencing Phase of a Capital Case.[65]

(1) The Standard for a Hearing and Confusion Below as to the Standard.

In Townsend v. Sain, 372 U.S. 293, 312 (1963), this Court held that a district court has the power to "receive evidence and try the facts anew" where a state prisoner "alleges facts which, if proved, would entitle him to relief." The Court then considered when an evidentiary hearing would be mandatory.

Where the facts are in dispute, the federal

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[64] See, e.g., Westbrook v. Zant, 704 F.2d 1487, 1503 (11th Cir. 1983); Corn v. Zant, 708 F.2d 549 (11th Cir. 1983); Tucker v. Zant, 724 F.2d 882, 891 (11th Cir. 1984), affirmed and considered en banc on other grounds, 762 F.2d 1480, (11th Cir. 1985); Collins v. Francis, 728 F.2d 1322 (11th Cir. 1984); and Moore v. Zant, 722 F.2d 640 (11th Cir. 1983). The one exception is the recent decision of Proffit v. Wainwright, 756 F.2d 1500 (11th Cir. 1985). That decision is simply incorrect, just as the court of appeal's instant decision is incorrect.

[65] It must be remembered that Petitioner sped through state trial court, the Florida Supreme Court, the federal district court, and into the Eleventh Circuit before obtaining a stay. See Statement of the Case, supra. Along the route to this Court, three courts adopted the erroneous proposition that Petitioner had waived the right to claim incompetence at trial. One cannot waive such a fundamental right, and it is assertable in post-conviction proceedings. Pate v. Robinson, 383 U.S. 375, 386 (1966); Drope v. Missouri, 420 U.S. 162, 174-75 (1975); Dusky v. United States, 362 U.S. 402 (1960). Therefore, the previous rulings on this claim are certainly not reliable.

> court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words, a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found relevant facts.

Id. at 312-313 (emphasis added).

The Townsend standard for a hearing has been applied consistently where factual questions arise in federal habeas proceedings no matter what particular constitutional issue is presented.[66]

A competency issue should be resolved through evidence and testimony, as required by Townsend. In this area where testimony is crucial, the Fifth Circuit and, following it, the Eleventh Circuit, have developed a higher standard for granting an evidentiary hearing when incompetency at the time of trial is alleged than that laid down in Townsend. The Eleventh Circuit requires habeas petitioners to virtually prove the incompetency claim before an evidentiary issue is allowed, rather than allowing an evidentiary hearing when "facts are in dispute." How this paradox developed is outlined in subsection 2, infra.

Other federal circuit and district courts do not make this unwarranted distinction between the right to an evidentiary

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[66]Boyd v. Dutton, 405 U.S. 1 (1972) (whether defendant knowingly and voluntarily waived his constitutional right to counsel before entering his guilty plea); Walker v. Wilmot, 603 F.2d 1038 (2d Cir. 1979) (whether confession was voluntary); Pierce v. Cardwell, 572 F.2d 1339 (9th Cir. 1978) (whether right to counsel violated and whether prosecution used perjured testimony); White v. Estelle, 556 F.2d 1366 (5th Cir. 1977) (whether plea agreement breached); Schneider v. Estelle, 552 F.2d 593 (5th Cir. 1977) (whether state knowingly used perjured testimony at trial); Gunsby v. Wainwright, 552 F.2d 127 (5th Cir. 1977) (whether inculpatory sworn statement was part of a plea bargain and therefore admissible against defendant at trial); Mason v. Balcom, 531 F.2d 717 (5th Cir. 1976) (whether defendant received effective assistance of counsel at trial); Austin v. Swenson, 522 F.2d 168 (8th Cir. 1975) (whether state prosecution withheld material evidence); United States ex. rel Mattox v. Scott, 507 F.2d 919 (7th Cir. 1974) (whether defendant's right to counsel during custodial interrogation violated); Wesley v. Alabama, 488 F.2d 30 (5th Cir. 1974) (whether defendant denied right to counsel and whether guilty plea coerced); Rhynes v. Wainwright, 480 F.2d 561 (5th Cir. 1973) (whether counsel present at sentencing); United States ex rel. Griffin v. Vincent, 359 F.Supp. 1072 (S.D.N.Y. 1973) (whether sentence imposed was of undue length).

hearing on incompetency at trial and other issues raised in federal habeas proceedings. These courts have, quite appropriately, applied the Townsend standard to grant or deny an evidentiary hearing on the Petitioner's competency to stand trial.[67] A claim of incompetency to stand trial or to be sentenced is necessarily a highly fact bound and complicated issue, requiring explanation by experts for a full evidentiary basis. As this Court has recently underscored, psychiatric and mental health issues are peculiarly suited for testimony: "[t]hrough...a process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination of the mental condition of the defendant...." Ake v. Oklahoma, _____ U.S. _____, 84 L.Ed.2d 53, 64 (1985) (emphasis added). Judges, no less than jurors, need this testimonial assistance.

(2) Eleventh Circuit Restrictions on Incompetency Hearings.

The restriction on evidentiary hearings had its genesis with Bruce v. Estelle, 483 F.2d 1031 (5th Cir. 1973) ("Bruce I"). In that case, the petitioner had litigated in state post-conviction proceedings the issue of competency to stand trial. The federal district court found that the competency issue was fairly resolved by the state court and dismissed the petition. In reversing the district court, the Fifth Circuit correctly framed the issue: Under the Townsend standard, there was a duty of the federal court to review the state court proceedings to determine whether they were conducted in a manner which would fairly adduce the facts surrounding petitioner's claims. Id. at 1038. Finding that the state pro-

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[67] Speedy v. Wyrick, 702 F.2d 723 (8th Cir. 1983); Suggs v. LaVallee, 570 F.2d 1092, 1109, 1114 (2d Cir. 1978); United States ex rel. Phelan v. Brierley, 453 F.2d 73, 96-97 (3d Cir. 1971) (Gibbons, J., dissenting) (Dissent notes that majority apparently agrees that an evidentiary hearing was required under Townsend); McCollum v. Sullivan, 507 F.Supp. 865, 868-869 (D.Del. 1981); Pierce v. Oklahoma, 436 F.Supp. 1026, 1032 (W.D. Okla. 1977); See also Vincent v. Louisiana, U.S. 105 S.Ct. 928 (1985) (Brennan and Marshall, JJ., dissenting); Meeks v. Smith, 512 F.Supp. 335 (W.D.N.C. 1981) (correct standard applied without mentioning Townsend).

ceedings had been inadequate, the Fifth Circuit remanded to the district court for further proceedings. In conclusion, the Fifth Circuit Court added language which is apparently the genesis of much of the Fifth and Eleventh Circuits' confusion about the issue:

> We consider it appropriate to add a caveat with respect to cases of this type. Courts in habeas corpus proceedings should not consider claims of mental incompetence to stand trial where the facts are not sufficient to positively, unequivocally, and clearly generate a real, substantial and legitimate doubt as to the mental capacity of the petitioner to meaningfully participate and cooperate with counsel during a criminal trial. While the factual pattern will vary from case to case, the instant case illustrates the standard which should be met to sustain such a claim, viz. a history of mental illness, substantial evidence of mental incompetence at or near the time of trial supported by the opinions of qualified physicians and the testimony of laymen. The burden is on the petitioner to prove his allegations; such proof should be clear and convincing.

Id. at 1043 (emphasis added).

This passage reveals that the court was referring only to the burden of proof that a petitioner must meet in order to prove the claim that he was incompetent at trial once a hearing is granted, not the standard for determining whether a litigant gets a hearing. First, the court clearly talks in terms of "sustain[ing] such a claim." Id. (emphasis added). Furthermore, as noted above, the court recognized and applied the Townsend standard for granting a hearing on incompetency in the case before it. Id. at 1038. Finally, the court, in another portion of its opinion, spoke directly to the issue of when a hearing is required in cases where an issue of incompetency to stand trial is raised:

> A petitioner is not automatically entitled to a hearing on his mental incompetency. He must set forth sufficient facts in his petition from which the court can properly determine that there is a need for such a hearing.

Id. at 1037, n.16 (emphasis added). In making this statement, the court relied on a number of 28 U.S.C. §2255 (federal post-conviction relief statute) cases which found that the allegations of incompetency at trial in the post-conviction

petition were sufficient to require a hearing.

In sum, Bruce I simply followed Townsend in determining whether an evidentiary hearing should be granted. If Bruce I added anything new, it was the "caveat" that, once an evidentiary hearing is granted, the federal district courts should not find incompetency at trial absent the petitioner's meeting a high standard of proof. Ironically, Bruce I became cited for much more.

Bruce I was followed by Bruce v. Estelle, 536 F.2d 1051 (5th Cir. 1976)("Bruce II"). In that case, an entirely different Fifth Circuit panel considered the "caveat" paragraph of Bruce I and determined:

> [W]e read the prior panel's caveat as referring only to the petitioner's threshold burden of proof which must be satisfied before the habeas court has a duty to investigate the constitutional challenge further. Once petitioner has come forward with enough probative evidence to raise a substantial doubt as to competency, however, his task is not complete. He must then go further and prove the fact of incompetency, at least by a preponderance of the evidence.

Id. at 1059 (emphasis added).

The court failed to explain why the normal Townsend standard for granting a hearing would no longer apply and what possible reasoning lay behind requiring habeas petitioners to prove by "probative evidence" a substantial doubt about their incompetency prior to their being allowed a hearing on the issues of competency in fact.[68] Later Fifth and Eleventh Circuit opinions uncritically followed this standard,[69] as did the Eleventh Circuit opinion in the case sub judice:

> As a matter of procedural due process, a criminal defendant is entitled to an evidentiary hearing on his claim of incompetency

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[68]In Zapata v. Estelle, 585 F.2d 750 (5th Cir. 1978) (en banc), the Fifth Circuit "explained" the standards of proof set out in Bruce I and Bruce II: Once a habeas petitioner raises a substantial doubt about his competency to stand trial by clear and convincing evidence, and thereby entitles himself to a hearing, he may prove incompetency in fact at the hearing by a preponderance of the evidence.

[69]But not exclusively. Cf. Davis v. Alabama, 545 F.2d 460, 465-466 (5th Cir. 1977) (Court quotes from Bruce "caveat" paragraph but looks only to allegations of petition to see if standard met).

> if he presents clear and convincing evidence to create a "real, substantial and legitimate doubt as to [his] mental capacity...to meaningfully participate and cooperate with counsel. . . ." Bruce v. Estelle, supra, 483 F.2d at 1043; See also Zapata v. Estelle, supra, 588 F.2d at 1021-22; Nathaniel v. Estelle, supra, 493 F.2d at 798. The standard of proof is high. The facts must "positively, unequivocally, and clearly generate" the legitimate doubt. Bruce v. Estelle, supra, 43 F.2d at 1043; see also, Pride v. Estelle, 649 F.2d 324, 326 (5th Cir. 1981) (requiring "more than a showing by a preponderance of the evidence" that the petitioner might have been incompetent at the time of the state trial).

Adams v. Wainwright, 764 F.2d 1356, 1360 (11th Cir. 1985) (emphasis added). This paragraph reveals the absolute confusion and obfuscation generated by Eleventh Circuit competency law.

(3) Under Townsend, An Evidentiary Hearing is Required.

Under this Court's clear Townsend standard, an evidentiary hearing was required upon Petitioner's allegations. First, there is no question that there has never been an evidentiary hearing on Petitioner's competency to stand trial at any stage of the original criminal trial and appellate review or during these collateral proceedings. Petitioner has been foreclosed, at every step, from putting on any evidence of mental incompetency. Petitioner's death warrant was signed on August 21, 1984, with execution scheduled to take place between noon on September 13 and noon September 20, 1984. Petitioner had no realistic opportunity to present his claims by way of post-conviction relief proceedings until the death warrant was signed, as he had no attorney from the time of his clemency hearing until undersigned counsel undertook his representation pursuant to the Florida Bar program. The haste with which counsel necessarily must act in death penalty cases, together with the lack of an opportunity for discovery (which was requested) or to present evidence, operate to make it nearly impossible to meet the heavy burden of proof required by the Eleventh Circuit to get a hearing on incompetency in fact.

Other than the report upon which the allegations of the amendment to the federal petition for writ of habeas corpus were based, all factual allegations concerning incompetency

necessarily had to be based upon pre-existing evaluations and the knowledge of the trial participants. Nevertheless, the evaluations are compelling. In the state post-conviction relief proceeding, the court refused to allow Petitioner's counsel to present even legal argument on the issues. (Ex. 25 at 289-303). In the district court, Judge Moore held a non-evidentiary hearing on the petition for writ of habeas corpus. (I-1)(G-3). Having demonstrated that no evidentiary hearing has been held, the remaining questions are whether the facts are in dispute, and whether, assuming Petitioner's allegations are true, he would be entitled to relief. Townsend, 372 U.S. at 312-13.

In the motion for post-conviction relief filed with the sate trial court, Petitioner alleged that he was incompetent to stand trial or to competently assist his trial counsel. (Ex. 25 at 19). In support of that allegation, Petitioner pled that:

> expert opinion will show that the Defendant has mental disorders that renders [sic] him incapable of recalling traumatic experiences which are unacceptable and undesirable to his conscience perception of himself. The mental disorder, known as catathymic amnesia, has rendered the Defendant incapable of aiding his counsel.

Id. at 34 (emphasis added).

The state court denied Defendant's post-conviction relief petition in an Order dictated to the court reporter. Id. at 295-96. The ruling was based upon the erroneous belief that Petitioner had waived his right to present the issue through post-conviction proceedings. Id. at 299-300. No evidentiary hearing was allowed and there was not even a review of the record as to this issue because "waiver" foreclosed the necessity of an inquiry merits.

Following the state trial court's denial of his motion for post-conviction relief, Petitioner appealed to the Florida Supreme Court and, in addition, petitioned the Florida Supreme Court directly for a state writ of habeas corpus, alleging ineffective assistance of appellate counsel. That court, like the state trial court before it, found the incompetency

claim to have been waived. Then, in dictum and without a hearing, the Florida Supreme Court determined that "the testimony that is being offered is a diagnosis of Adams' present condition and is not evidence that he suffered from this disorder at the time of the trial." Adams, 456 So.2d at 890. The origin of the term "testimony" is unclear as, again, no evidentiary hearing was allowed in the state post-conviction proceedings. The court's opinion that the evaluations showed only current incompetency involves a question of fact; the petition had pled otherwise.

In his petition for a writ of habeas corpus before the federal district court, Petitioner again pointed to the fact that his trial counsel had specifically told the state trial court post-trial that Petitioner was unable to assist his counsel at trial because he could not remember information concerning the crime which could assist in his defense. Furthermore, Petitioner specifically alleged that post-conviction evaluations by psychologists and the psychological screening report prepared by the Florida Department of Offender Rehabilitation would prove that he had mental disorders which rendered him incapable of recalling traumatic experiences. These reports showed a diagnosis of:

1. Catathymic amnesia;
2. Significant personality disturbance;
3. Hostile, perhaps paranoid, tendency;
4. An inability to appropriately control emotion;
5. Sexual immaturity;
6. A considerable history of sexual difficulties and abnormalities onsetting at puberty; and
7. From his past behavioral history Petitioner appears passive aggressive, with strong psychopathic sexual episodes.

(R-31)(footnotes omitted).

In an amendment to his federal habeas petition, Petitioner alleged that if he were granted an evidentiary hearing he would present evidence that, at the time of the crime, he was psychotic and paranoid, he had impaired judgment as a result of a mental disorder, and he was unable to control his actions or to conform them to the requirements of the law. He further alleged he would

show that this evidence should have been discovered and presented to the trial court during the sentencing phase of his trial, as a part of his argument that his trial counsel failed to adequately investigate, develop and present evidence in mitigation in the sentencing phase of Petitioner's trial. (R-211-12). Despite these verified allegations, Petitioner was once again denied an evidentiary hearing.[70]

The district court resolved the evidentiary issues without an evidentiary hearing by relying heavily on Petitioner's trial counsel's pre-trial statement that he knew of no evidence at that time to suggest that Petitioner was incompetent, and that it would therefore be improper for the court to order a competency examination. The Eleventh Circuit, however, discounted this reason because the psychological testing of Petitioner was not sufficiently complete at that time for the attorney to conclude that no claim of incompetency would be raised. The Eleventh Circuit also refused to accept the district court's determination that counsel's post-trial statement regarding Petitioner's lack of competency was "self-serving". However, the Eleventh Circuit did conclude that counsel's statement did not meet the incompetency standard set out in Dusky v. United States, 362 U.S. at 402, because "it is possible for a defendant to have no recall of his involvement in a crime and yet fully understand the proceedings against him and cooperate meaningfully with his attorney in his defense." Adams, 764 F.2d at 1361. The Eleventh Circuit assumed without evidence that Petitioner fully understood and assisted.

The Eleventh Circuit also accepted without criticism the Florida Supreme Court's and district court's characterization of the psychological "testimony" as relating only to Petitioner's present condition. In especially strange comments regarding a petitioner who had been denied an evidentiary hearing at every step, the Eleventh Circuit stated that the "evaluation

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[70]The district court found alternatively that Petitioner had waived his competency claim. The Eleventh Circuit correctly determined that such a claim is not subject to waiver.

does not even appear to have been made part of the record on appeal, and thus we are unable to consider its content" and that the State's assertion that the evaluation speaks only to present condition "stands unrebutted." Adams, 764 F.2d at 1361, 1367 n.14. Petitioner pleads for the opportunity to rebut the unfounded "assertions" by the State.

The pleadings fairly raised the competency issue, and a hearing should have been afforded. This disagreement between the district court and the Eleventh Circuit as to the facts and their import demonstrates that there do indeed exist disputes as to the facts underlying Petitioner's claim of incompetency.[71]

(4) Assuming Proof of the Allegations at a Hearing, Petitioner Will be Entitled to Relief.

The only remaining issue, then, is whether, if Petitioner proves the allegations of his petition, he would be entitled to relief. The Eleventh Circuit, while recognizing the Dusky standard for incompetence at trial, found that Mr. Adams' inability to provide information to his counsel which would assist in his defense did not meet that standard as "it is possible for a defendant to have no recall of his involvement in a crime and yet fully understand the proceedings against him and cooperate meaningfully with his attorney in his defense." Adams, 764 F.2d at 1361. This holding fails to comport with two constitutional mandates -- that no legally incompetent defendant be made to defend himself and that exacting procedural safeguards attend the sentencing phase of a death penalty case.

Trial and conviction of a legally incompetent defendant violates his right to due process of law. Drope v. Missouri, 420 U.S. 162 (1975). To determine whether a defendant is competent, the Supreme Court of the United States has fashioned the following test: Does this defendant have a present ability to consult with his lawyer with a reasonable degree of rational

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[71] A determination of whether Petitioner was incompetent to stand trial involves the application of the constitutional due process standard to the underlying facts. Drope v. Missouri, 420 U.S. 162, 174-175 (1975).

understanding and does the defendant have a rational and factual understanding of the proceedings. Dusky v. United States, 362 U.S. 402 (1960).

In a death penalty case, incompetency takes on an added dimension: this Court has dictated a heightened level of procedural safeguards in order to ensure that death, "punishment unique in its severity and irrevocability," is not imposed arbitrarily or capriciously. Gregg v. Georgia, 428 U.S. 153, 187 (1976), citing, Furman v. Georgia, 408 U.S. 238, 286-291 (Brennan, concurring). In formulating those procedural safeguards the Court has, understandably, given considerable attention to the sentencing phase of a capital case:

> [T]he concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

Gregg, 428 U.S. at 195 (emphasis added).

While Petitioner was able to recall some details of the crime some six to seven months prior to his trial, a capacity which diminished even as he made his confession (Ex. 9, 1098-1102), by the time he was tried in state court, Petitioner fit exactly the scenario envisioned by the Circuit Court -- no recall.[72] This left Petitioner helpless to rebut any of the aggravating factors argued for by the state at the penalty phase of the trial.

As the United States Supreme Court has recognized on more

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[72]The Eleventh Circuit found it "highly significant" that petitioner's counsel did not raise a competency claim at trial or sentencing. Adams, 756 F.2d at 1358. Counsel undoubtedly realized Petitioner's inability to recall and the Eleventh Circuit accepted counsel's statement to this effect as true. Id. What trial counsel failed to realize was the legal significance of this lack of recall as it affected the penalty phase of the trial. Based on the record in this case, to conclude Petitioner was competent merely because his counsel did not raise the issue is pure conjecture. See Pate v. Robinson, 383 U.S. 375, 386 (1966).

than one occasion, failure of the trial court to consider all factors relating to the defendant's character, record and circumstances of the offense in sentencing

> creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the demands of the eighth and fourteenth amendments.

Lockett v. Ohio, 438 U.S. 586, 605 (1978); see also, Eddings v. Oklahoma, 455 U.S. 104 (1982); Bell v. Ohio, 438 U.S. 637 (1978). The constitutional injury is no less grievous when the defendant is prevented from presenting evidence in mitigation, or from contesting the state's evidence of aggravating circumstances, when the omission of crucial evidence is due to the defendant's inability to recall his involvement in the crimes, and the court fails to intervene with a finding of incompetence.

The significance of Petitioner's inability to recall becomes evident when one considers that whether Petitioner was sentenced to death depended on the evidence of aggravating and mitigating circumstances considered at the penalty phase of the trial. The trial court found three aggravating circumstances: That the capital felony was committed while Petitioner was engaged in or attempting to engage in, or in the flight after committing or attempting to commit rape and/or kidnapping; that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; and that the capital felony was especially heinous, atrocious or cruel.

Petitioner was unable to recall the events, and so was unable to rebut these findings. Because, in order to impose the death penalty under Florida law the aggravating factors must outweigh the mitigating ones, and because there were three mitigating factors found, Petitioner's catathymic amnesia quite possibly serves as the difference between a sentence of death and a sentence of life imprisonment in this case. Fla. Stat. § 921.141.

If the elaborate sentencing procedures suggested in Furman and approved in Gregg are to function properly, the sentencing

authority must, as stated in Gregg, be given all the relevant facts in order to make an informed, as opposed to arbitrary, sentencing decision. Gregg, 428 U.S. at 189-193. Where the criminal defendant is unable, because of a medically recognized mental defect, to put on evidence to refute the state's evidence of aggravating circumstances, the system fails because a fully informed decision is not possible. This is especially true where, as here, the aggravating circumstances involve subtle questions of intent and purpose. Not only was Petitioner prevented by his catathymic amnesia from putting on evidence of what actually occurred, he could not respond to charges that he intended to rape or kidnap the victim, that he committed the capital felony with the intent of avoiding arrest, or that the murder was performed in a manner that purposely caused suffering to the victim or pleasure to him. Petitioner was as helpless in the face of the jury's and judge's consideration of these issues as if he had been refused by the court an opportunity to speak in his behalf at the sentencing phase of the trial, a situation which would undoubtedly cause immediate reversal by this Court. Futhermore, the lack of an adequate factual basis upon which to determine whether aggravating factors were present invites the sort of arbitrary and capricious decision-making condemned in Gregg and Furman.[73]

B. Petitioner Was Improperly Denied An Evidentiary Hearing Regarding Ineffective Assistance of Trial Counsel.

In addition to having been denied a hearing on his claim of incompetency to stand trial, Petitioner has been denied a hearing on his claim of ineffective assistance of counsel. The standard for a hearing, set out by this Court in Townsend has been discussed in detail above. Briefly, a hearing is

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[73]It is worthy to note in this regard that the dissents from the opinions of the Florida Supreme Court on both direct appeal and on appeal from the trial court's denial of Petitioner's motion to vacate his conviction and sentence found the aggravating circumstances, as determined by the trial court, unconvincing, unsupported, and insufficient for a death sentence. Adams v. State, 412 So.2d 850, 857 (Boyd, J., concurring and dissenting), Adams v. State, 456 So.2d 888 (Fla. 1984) (McDonald, J., dissenting).

mandatory where (1) there was an inadequate state court hearing on the issue raised, (2) there are facts in dispute and (3) the petitioner alleges facts which, if proved, would show that he is entitled to relief. Townsend, 372 U.S. at 312. In this case, Petitioner never received a state court hearing and so the district court necessarily found that there had been no full and fair hearing, and the state has never challenged that finding. (I-25) (Eleventh Circuit, Brief for Respondents-Appellees, at 31).[74] Accordingly, Petitioner will address only the second and third Townsend requirements.

Mr. Adams alleges two general types of information which counsel failed to properly investigate, develop and present evidence: (1) Petitioner's incompetency to stand trial or, alternatively, to participate in the sentencing phase of his trial, and (2) mitigation evidence in the sentencing phase of Petitioner's trial.

(1) The Standard Regarding Effective Assistance of Counsel.

The proper constitutional standard for an attorney's performance is "reasonably effective assistance." Strickland v. Washington, 466 U.S. 688, 80 L.Ed.2d 674, 693 (1984). A defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Id., 80 L.Ed.2d at 697. Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., 80 L.Ed.2d at 698. Whether Petitioner received reasonably effective assistance of counsel is a mixed question of law and fact. Id., L.Ed.2d at 700. With regard to the duty to investigate and develop possible defenses, this Court said in Strickland that "counsel has a duty to make reasonable investigations or to make a

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[74]The lack of a full and fair state court hearing also means that any state court findings of fact as to this issue are not subject to the deference requirement of 28 U.S.C. §2254(d).

reasonable decision that makes particular investigations unnecessary." Id., 80 L.Ed.2d at 695. See also Davis v. Alabama, 596 F.2d 1214, 1219 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978).

Several factors combine in this case to require counsel to conduct the most thorough of investigations. First, this Court has recognized the unique role played by the sentencing phase of a death penalty case because, as noted in Gregg v. Georgia, 428 U.S. 153, 187 (1978), death is "a punishment unique in severity and irrevocability". See also Strickland, 80 L.Ed.2d at 693. Second, this Court has recently noted the crucial importance of testimony by mental health professionals, such as psychologists and psychiatrists, at the sentencing phase of a death penalty case. Ake v. Oklahoma, ___U.S.___, 84 L.Ed.2d 53 (1985). Ake is in accordance with the recognition by the federal courts of the importance of putting on all available mitigating evidence, because it is with such evidence that the delicate balance between a sentence of life imprisonment and a sentence of death lies. See Lockett v. Ohio, 438 U.S. 586 (1978)(plurality opinion); Bell v. Ohio, 438 U.S. 637, 642 (1978); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985). Third, where a defendant is unable to recall information important to his defense, there is a heightened degree of duty on the part of counsel to develop other sources of evidence in support of that defense. Davis v. Alabama, 596 F.2d 1214, 1219 (5th Cir. 1979).

(2) Counsel Made Unreasonable Omissions Which Prejudiced Mr. Adams.

Applying this heightened level of investigative duty on co' sel's part during a capital case, especially the sentencing phase of that case, it is clear that Mr. Adams' trial counsel's failure to develop evidence concerning his incompetency to stand trial, to present the evidence he did have to show incompetency, especially to participate in the sentencing phase of this trial, and his failure to investigate and present

evidence in mitigation during that sentencing phase, caused his representation to fall below that of reasonable effectiveness. Mr. Adams would prove as much at a hearing. Had it not been for these errors, there is a reasonable probability that the result of the proceeding would have been different.

In order to more fully understand why these omissions constituted ineffective assistance of counsel, one must first understand what the mitigating evidence showed during the sentencing phase of Petitioner's trial. The state trial court found as mitigating factors Petitioner's young age, lack of significant criminal history, and that Petitioner was under the influence of extreme mental or emotional disturbance at the time of the crime. This latter finding was apparently based in part on the testimony of Dr. Arthur Sullwold, who had examined Mr. Adams on April 27, 1978, over five months before trial. (Ex. 8 at 1394). Dr. Sullwold formed the opinion that, at the time of the crime, Mr. Adams was under the influence of extreme mental or emotional disturbance (Ex. 8 at 1396). He also testified that he would not expect that Mr. Adams would appear out of the ordinary in the recent past, while he was in jail. (Ex. 8 at 1399).

In order to impose the death penalty under Florida law, the court must find that aggravating factors outweigh mitigating ones. Fla. Stat. § 921.141. Here, the trial court found three aggravating factors and, as noted above, three mitigating factors. Based on this, the trial court found that aggravating circumstances outweighed the mitigating ones and that the sentence of death could be imposed under Florida law.

While defense counsel presented evidence, of, and the trial court found, that Mr. Adams committed this "capital felony...while...under the influence of extreme mental or emotional disturbance" Section 921.141(6)(b), Florida Statutes, there was no development of testimony regarding the closely allied mitigating factor set out in Section 921.141(6)(f), Florida Statutes:

> The capacity of the Defendant to appreciate the criminality of his conduct or to

> conform his conduct to the requirements of law was substantially impaired.

Nor was there any development of other testimony which would have been relevant to the finding of mitigating factors not specifically set out in the statute but which are allowed consideration by the sentencing court. Fla. Stat. § 921.141(1).

In addition, despite the professional opinion of prior "extreme mental or emotional disturbance", counsel conducted no independent investigation of Petitioner's trial competency and requested no competency hearing. This omission becomes even more striking when one notes that counsel himself stated following trial that "prior [to] and during the trial, Dennis Adams could not remember and therefore could not provide information concerning the killing that would assist with his defense." (Ex. 15 at 133 - the presentence investigation report). A hearing is necessary to prove these claims.

As noted by the court in Strickland:

> When a defendant challenges a death sentence ...the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

80 L.Ed.2d at 698 (emphasis added). Petitioner has pled, in his amended federal habeas petition, that if given a hearing he could present a professional diagnosis that his condition affected his ability to conform his conduct to the requirements of the law. Given that fact, as well as the other evidence now available showing Petitioner's mental state, and the potential for development of such evidence into one or more unenumerated mitigating factors under Section 921.141(1), Florida Statutes, there is a reasonable probability that a reasonable investigation would have revealed to defense counsel this picture of Mr. Adams' mental state. Assuming, as this Court must under Townsend, that such allegations can be proved, certainly there is a "reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death" given the near equipoise of the aggravating and mitigating circumstances found

by the sentencing court in this case.

Similarly, though Mr. Adams' trial counsel recognized that Petitioner could not remember details sufficient to aid in his defense, trial counsel failed to understand the legal significance of that situation. That Petitioner's inability to recall the events surrounding the crime made him unable to defend himself against the state's evidence of aggravating circumstances, the legal implications of that inability under Drope and Dusky, and the factual questions raised, are discussed extensively under Petitioner's argument that he is entitled to a hearing on incompetency and will not be repeated here. In light of Petitioner's allegations of incompetency, based on post-conviction psychological evaluations, together with counsel's clear recognition of Petitioner's inability to recall the events surrounding the crime, there is a reasonable possibility raised that, had Petitioner's counsel properly evaluated the legal significance of that inability to recall and requested a competency hearing, Petitioner would have been found incompetent to stand trial.

These points highlight, in addition, the factual disputes raised in this case which require a Townsend hearing. Because Petitioner has never been given a hearing on the issue of ineffectiveness of counsel, neither Petitioner, his trial counsel or his mental health experts, have ever been allowed to testify. This lack of testimony leaves unresolved questions concerning both Mr. Adams' mental state at the time of the crime and at the time of trial and the reasons for counsel's failure to develop evidence of Mr. Adams' incompetency to stand trial and mitigating factors at the sentencing phase of this trial. It cannot be said on the basis of this record that the facts then available to counsel simply did not warrant such an investigation. Again, Dr. Sullwold's testimony clearly states that Petitioner suffered from "extreme mental or emotional disturbance" at the time of the crime. Furthermore, there is now available expert testimony that Petitioner was incompetent at the time of trial and was suffering from a mental disturbance

which would, at the least, have allowed the sentencing court to find the "diminished capacity" mitigating factors set out in Section 921.141(6)(f), Florida Statutes. Most telling, trial counsel himself made the statement that Mr. Adams could not remember crucial details about the crime and therefore could not aid in his defense. See Speedy v. Wyrick, 702 F.2d 723, 726-727 (8th Cir. 1983)(Despite testimony of two psychiatrists that at the time of their examination Defendant was competent to stand trial and because of events occurring closer to and during trial, the trial attorney should have been aware of Defendant's incompetency and was apparently unaware of the legal possibility of a competency hearing; accordingly, the case was remanded to district court for evidentiary hearing to resolve factual issues); Beavers v. Balkcom, 636 F.2d 114 (5th Cir. 1981) (Even though trial counsel explored insanity defense and presented some evidence of his sanity at trial, factual questions needed to be answered concerning what further investigation would have shown and what professional help would have added to his defense.)

In summary, Petitioner has shown that (1) there was an inadequate state court hearing on ineffectiveness of counsel; (2) there are facts in dispute as to Petitioner's mental state at the time of the crime and the time of trial and what investigation was done by trial counsel into Petitioner's mental state, both as it related to his competency to stand trial and as to the development of additional mitigating factors, and the results of that investigation; and (3) if the allegations of fact made during Petitioner's post-conviction proceedings are proved, Petitioner will be entitled to relief under the standard set out in Strickland. The Circuit Court's decision denying a hearing conflicts with Townsend, and certiorari review is appropriate.

CONCLUSION

The right of life should be closely guarded and jealously protected by our judicial system. Capital punishment stands apart from other forms of criminal punishment because it deprives

the defendant of this precious right to life and because this deprivation is final and irrevocable. Consequently, any proceeding that concludes with the imposition of the death penalty must be scrutinized carefully. This was an especially close case. The mitigating and aggravating factors, according to the state trial court, were equally divided three to three. Dissents in the state court appellate opinions noted that some of the aggravating factors were highly questionable. In light of this, and in light of the numerous errors pointed out herein, this Court should issue a writ of certiorari to review the decision of the United States Circuit Court for the Eleventh Circuit.

DATED this 11th day of November, 1985.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing Petition and accompanying Appendices have been furnished by U.S. Mail to Ms. Margene Roper, Assistant Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, FL 32014, and that the original and nine copies of the foregoing Petition and accompanying Appendices have been furnished by Federal Express to the Clerk of the United States Supreme Court, Washington, D.C. 20543, this 11th day of November, 1985.

Kenneth R. Hart
ATTORNEY